# In the Supreme Court of the United States

OCTOBER TERM, 1996

---

UNITED STATES OF AMERICA, PETITIONER

*v.*

EDWARD G. SCHEFFER

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES*

---

## PETITION FOR A WRIT OF CERTIORARI

---

WALTER DELLINGER
*Acting Solicitor General*

JOHN C. KEENEY
*Acting Assistant Attorney General*

MICHAEL R. DREEBEN
*Deputy Solicitor General*

MICHAEL J. BRESLIN
*Lt. Colonel, USAF*
*Appellate Government Division*
*Bolling Air Force Base*
*Washington, D.C. 20332*

MIGUEL A. ESTRADA
*Assistant to the Solicitor General*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

106 pp

## QUESTION PRESENTED

Whether Military Rule of Evidence 707, which provides that evidence of a polygraph examination is not admissible in court-martial proceedings, is an unconstitutional abridgment of military defendants' right to present a defense.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page



Constitution, statutes and rules:





Statutes and rules—Continued: Page



Miscellaneous:

# In the Supreme Court of the United States

OCTOBER TERM, 1996

---

No.

UNITED STATES OF AMERICA, PETITIONER

*v.*

EDWARD G. SCHEFFER

---

***ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES***

---

## PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 44 M.J. 442. The opinion of the Air Force Court of Criminal Appeals (App., *infra*, 25a-53a) is reported at 41 M.J. 683.

### JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on September 18, 1996. On December 10, 1996, Chief Justice

Rehnquist extended the time within which to file a petition for a writ of certiorari to and including January 16, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

## RULE AND CONSTITUTIONAL PROVISIONS INVOLVED

Military Rule of Evidence 707 provides:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.
>
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

The Fifth and Sixth Amendments to the United States Constitution are reprinted at App., *infra*, 77a-78a.

## STATEMENT

Following trial by a general court-martial, respondent was convicted of uttering 17 insufficient-funds checks, using methamphetamine, failing to go to his appointed place of duty, and wrongfully absenting himself from the base for 13 days, in violation of Articles 123a, 112a, and 86 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 923a, 912a, and 886. He was sentenced to 30 months' confinement, to forfeiture of all pay and allowances, and to a bad conduct discharge. The Air Force Court of Criminal Appeals affirmed, with the proviso that



respondent should receive credit for one day's forfeitures. App., *infra*, 25a-53a. The Court of Appeals for the Armed Forces reversed and remanded. *Id.* at 1a-24a.

1. This case involves the constitutional validity of a rule excluding from court-martial proceedings in the armed forces any evidence of a polygraph examination. In broad terms, a polygraph examination is a credibility assessment; it is based on an expert examiner's interpretation of physiological responses that are controlled by the subject's autonomous nervous system. After a preliminary interview with the subject, the examiner asks a number of questions while measuring the subject's relative blood pressure (obtained from an inflated cuff on the upper arm) and other indications of blood flow, his "galvanic skin response" (*e.g.*, palmar sweating), and his respiration (obtained from sensors placed on the subject's chest or abdomen). The questions asked in most tests ordinarily fall into three broad categories: direct accusatory questions concerning the matter under investigation, irrelevant or neutral questions, and more general (so-called "control") questions concerning whether the subject has engaged in wrongdoing. The examiner forms an opinion with respect to the subject's truthfulness by comparing the subject's physiological reactions to each set of questions. See generally 1 P. Giannelli & E. Imwinkelried, *Scientific Evidence* 219-222 (2d ed. 1993); C. Honts & B. Quick, *The Polygraph in 1995: Progress in Science and the Law*, 71 N.D.L. Rev. 987, 989-993 (1995).

In *United States* v. *Gipson*, 24 M.J. 246 (1987), the Court of Military Appeals (now the Court of Appeals for the Armed Forces) concluded that poly-

graph techniques had reached a sufficient degree of reliability that evidence of a polygraph examination should not be routinely excluded from court-martial proceedings under Military Rule of Evidence 702.[1] The court noted that "[i]f anything is clear, it is that the battle over polygraph reliability will continue to rage," but it concluded that "until the balance of opinion shifts decisively in one direction or the other, the latest developments * * * should be marshaled at the trial level." 24 M.J. at 253. Accordingly, the court held that a serviceman who testifies at his court-martial trial is entitled to lay a foundation showing the scientific basis for polygraph results consistent with his exculpatory testimony. *Id.* at 252-253.

On June 27, 1991, "[b]y the authority vested in [him] as President by the Constitution of the United States and by chapter 47 of title 10 of the United States Code [*i.e.*, the UCMJ]," the President responded to *Gipson* by promulgating Military Rule of Evidence 707.[2] See Exec. Order No. 12,767, 3 C.F.R. 334, 339-340 (1991 comp.). The drafters' commentary that accompanied the rule explained its adoption by reference to several policies:

> There is a real danger that court members will be misled by polygraph evidence that "is likely to be shrouded with an aura of near-infallibility." *United States v. Alexander*, 526 F.2d 161, 168-169 (8th Cir. 1975). * * * There is also a danger of confusion of the issues, especially when conflicting polygraph evidence diverts the [court-martial] members' attention from a determination of guilt or innocence to a judgment of the validity and limitations of the polygraphs. * * * Polygraph evidence also can result in a substantial waste of time when the collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case. Polygraph evidence places a burden on the administration of justice that outweighs the probative value of the evidence.

App., *infra*, 82a-83a. Those considerations, the drafters stated, warrant "a bright-line rule that polygraph evidence is not admissible by any party to a court-martial." *Id.* at 83a.

2. On March 27, 1992, respondent, an airman stationed at March Air Force Base, California, opened a checking account with the Security Pacific Bank with a $277 deposit. He made no arrangements for his pay to be deposited into the account, and he withdrew $200 on the same day the account was opened. On March 31, 1992, respondent telephoned the bank and stated that he had lost his ATM card and the temporary checks that the bank had issued for the account. He was apparently told that the account would be closed for security reasons. After that tele-

[1] Military Rule of Evidence 702, like its counterpart in the Federal Rules of Evidence, provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

[2] Article 36(a) of the UCMJ, 10 U.S.C. 836(a), provides that "[p]retrial, trial, and post-trial procedures, including modes of proof * * * may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."

phone call, between April 1 and May 3, respondent wrote 17 checks on the account, totalling approximately $3,300 in checks drawn on insufficient funds. See App., *infra*, 25a; 3 Trial Rec. 237-245, 249.

In late March 1992, as he was beginning the Security Pacific scheme, respondent volunteered to assist the Air Force Office of Special Investigations (OSI) with drug investigations, and informed OSI that he had information on two civilians who were dealing in significant quantities of drugs. App., *infra*, 2a, 26a. On April 7, 1992, one of the OSI agents supervising respondent requested that respondent submit to a urine test. Respondent agreed, but he stated that he could not provide a urine specimen then, because he urinated only once a day. He submitted to a urinalysis on the following day. On May 14, 1992, OSI agents learned that respondent's urine had tested positive for methamphetamine. *Id.* at 26a-27a.

On April 10, 1992, two days after providing a urine sample, respondent agreed to take a polygraph administered by an OSI examiner. According to the examiner, respondent's polygraph charts "indicated no deception" when respondent denied that he had used drugs since joining the Air Force. App., *infra*, 2a-3a, 26a-27a. Later that month, on April 30, 1992, respondent unaccountably failed to appear for work and could not be found on the base. Respondent was not heard from again until May 13, 1992, when an Iowa State Patrolman telephoned the base with news that respondent had been arrested in that State following a routine traffic stop; upon learning that respondent was AWOL, the patrolman held respondent for return to the base. See 3 Trial Rec. 258-259, 265-267.



At his trial, respondent advised the court that he intended to testify in his defense, and that he wished to rely on "the results of the exculpatory polygraph" to corroborate "an innocent ingestion defense" to the drug charges. 2 Trial Rec. 42, 43-44. Respondent argued that Rule 707 'is unconstitutional if it prohibits an accused from introducing relevant and helpful exculpatory evidence," and he argued that he should be permitted to lay a foundation "to show that in this particular case * * * the polygraph results are relevant and helpful." 2 Trial Rec. 44.

The military judge noted that "[f]or evidence to be helpful, the testimony of the polygrapher would have to be in an area in which the factfinder himself needs help in making a decision." 2 Trial Rec. 46. In his view,

> the President may, through the Rules of Evidence, determine that credibility is not an area in which a fact finder needs help, and the polygraph is not a process that has sufficient scientific acceptability to be relevant.

*Ibid.* The military judge also noted that "[t]he fact finder might give * * * too much weight" to polygraph testimony, and that arguments about such testimony could take "an inordinate amount of time and expense. * * * Given those concerns, I don't believe that the constitution prohibits the President from appropriately ruling that polygraph evidence will not be admitted in a court-martial." *Ibid.* Respondent later testified that he did not recall "knowingly" ingesting methamphetamine. He was convicted. App., *infra*, 3a-4a.

3. The Air Force Court of Criminal Appeals, sitting en banc, rejected respondent's contention that

the exclusion of the polygraph evidence deprived him of a fair trial. App., *infra*, 25a-53a. After reviewing this Court's decisions in *Washington* v. *Texas*, 388 U.S. 14 (1967), *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), and *Rock* v. *Arkansas*, 483 U.S. 44 (1987), see App., *infra*, 32a-35a, the court concluded that the Constitution forbids evidentiary rules that "*arbitrarily* limit the accused's ability to present reliable evidence," "*arbitrarily* limit admission [of evidence] by the defense to a greater degree than by the prosecution," or "*arbitrarily* infringe on the right of the accused to testify on his own behalf." *Id.* at 40a.

The court noted that Rule 707 is "equally applicable to both the prosecution and the defense" and does "not infringe on the right of the accused to testify on his own behalf." App., *infra*, 43a. It also observed that Rule 707 could not be viewed as an "arbitrary" limitation on reliable evidence, because "[t]he President's decision to prohibit polygraph evidence is not based on whim or impulse, but rather on sound reasoning." App., *infra*, 40a. The court explained that there remain "valid concerns" about polygraph examinations and that:

> The President is rightly concerned that courts-martial could degenerate into a battle of polygraph examinations and experts that would impose a burden on the administration of military justice that would outweigh the value of the evidence.

*Id.* at 41a. The court concluded "[w]hile it might be arbitrary for the President to promulgate a rule" barring evidence that is widely accepted by courts as reliable, "such as fingerprint evidence" (*id.* at 43a),



the President acted within his authority in barring polygraph evidence, which routinely is ruled inadmissible by the civilian courts (*id.* at 42a-43a).

Judge Pearson, joined by Judge Schreier, dissented in part. App., *infra*, 49a-53a. He believed that properly conducted polygraph examinations may provide "vital" evidence in a case in which the defendant's credibility "becomes the whole ball game." *Id.* at 51a.

4. By a three to two vote, the United States Court of Appeals for the Armed Forces reversed. The court agreed with respondent's claim that Rule 707 "violates his Sixth Amendment right to present a defense because it compelled the military judge to exclude relevant, material, and favorable evidence offered by" respondent. App., *infra*, 4a. Assuming that the President properly promulgated Rule 707 pursuant to the UCMJ, see App., *infra*, 7a, the court concluded that, under *Rock* v. *Arkansas*, *supra*, the President's "legitimate interest in barring unreliable evidence does not extend to *per se* exclusions [of evidence] that may be reliable in an individual case." App., *infra*, 8a (quoting *Rock*, 483 U.S. at 61). The court acknowledged that *Rock* "concerned exclusion of a defendant's testimony and this case concerns exclusion of evidence supporting the truthfulness of a defendant's testimony," but it could "perceive no significant constitutional difference between the two." App., *infra*, 9a.

Finally, the court noted that in *Montana* v. *Egelhoff*, 116 S. Ct. 2013 (1996), this Court upheld a state "statute excluding evidence of voluntary intoxication when a defendant's state of mind is at issue." App., *infra*, 13a. The court observed, however, that *Egelhoff* was a "fragmented" decision that is best

read as "founded on the power of the state to define crimes and defenses." *Id.* at 14a. The court also found *Egelhoff* inapposite because Rule 707 does not address a fact to be proved, but instead "bars otherwise admissible and relevant evidence based on the mode of proof by categorically including polygraph evidence. While the plurality in *Egelhoff* questions whether the distinction between the fact to be proved and the method of proving it makes a difference, 116 S. Ct. at 2017 n.1, only four justices joined in that observation." App., *infra*, 15a.[3]

Judges Sullivan and Crawford filed separate dissents. App., *infra*, 16a-24a. Judge Sullivan's dissent was based on his concurring opinion in *United States* v. *Williams*, 43 M.J. 348 (1995), cert. denied, 116 S. Ct. 925 (1996), a case in which the court of appeals had declined to address the constitutional validity of Rule 707, because the accused did not testify. App., *infra*, 67a-68a. Writing separately in *Williams*, Judge Sullivan concluded that polygraph evidence is inadmissible under Military Rule of Evidence 608, which restricts what evidence may be offered in support of a witness's "character for * * * truthfulness." App., *infra*, 75a. Judge Sullivan believed, moreover, that such evidence "infringes on the jury's role in

[3] The court also noted that in *Wood* v. *Bartholomew*, 116 S. Ct. 7 (1995) (per curiam), this Court summarily reversed the Ninth Circuit's determination that a state prosecutor violated his duties under *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to disclose the results of certain polygraph examinations. App., *infra*, 12a-13a. The court observed that *Bartholomew* involved "prosecution witnesses, not the accused," and it added that while this Court "noted that polygraph evidence was inadmissible under [state] law, * * * [t]he constitutionality of the state law was not before the Court and * * * was not addressed." *Id.* at 12a-13a.



determining credibility," because "[o]ur adversary system is built on the premise that the jury reviews the testimony and determines which version of events it believes." *Id.* at 75a-76a (internal quotation marks omitted). In his view, Rule 707 "properly" addresses those concerns. App., *infra*, 76a.

Judge Crawford argued that a defendant's right to present relevant evidence "is 'not [an] absolute,' " and must yield to policy considerations such as those that supported the President's decision to adopt Rule 707. App., *infra*, 17a, 21a. He also took issue with the court's characterization of *Egelhoff*, noting that the four-Justice plurality and the four dissenting Justices agreed "that relevant, reliable evidence may be excluded if there is a valid policy reason for doing so." *Id.* at 21a. Finally, Judge Crawford argued that the court's ruling would have a seriously adverse impact on the military's "worldwide system of justice." *Ibid.*

## REASONS FOR GRANTING THE PETITION

The court of appeals held that Military Rule of Evidence 707's categorical preclusion of polygraph evidence from courts-martial violates the Sixth Amendment right of a testifying defendant to present a defense. That holding conflicts with judgments of state and federal courts, which have consistently upheld the constitutionality of rules precluding polygraph evidence from criminal trials. It also misapplies this Court's Sixth Amendment decisions, which recognize that categories of evidence may be excluded from criminal trials where (as here) the exclusion is neither arbitrary nor disproportionate to legitimate interests. Finally, the holding threatens to burden military justice with case-by-case litigation

about polygraph evidence, a result that is at odds with the assigned function of the military to attend to the Nation's defense and the purpose of Rule 707 to avoid those costs. Accordingly, this Court's review is warranted.

1. The rule invalidated by the Court of Appeals for the Armed Forces has counterparts in the evidentiary rules of numerous States, which categorically prohibit the introduction of polygraph evidence in criminal cases. See, *e.g.*, *State* v. *Okumura*, 894 P.2d 80, 94 (Haw. 1995) ("well-established precedent in this jurisdiction" is that "polygraph results are not admissible at trial whether offered by the prosecution or the defense"); *Morton* v. *Commonwealth*, 817 S.W.2d 218, 222 (Ky. 1991) ("ample basis for this Court to reiterate the inadmissibility of polygraph results and flatly declare that under no circumstances should polygraph results be admitted into evidence"); *Commonwealth* v. *Mendes*, 547 N.E.2d 35, 41 (Mass. 1989) ("supported by the overwhelming authority throughout the country, we announce that polygraphic evidence * * * is inadmissible in criminal trials in this Commonwealth either for substantive purposes or for corroboration or impeachment of testimony"); *State* v. *Lyon*, 744 P.2d 231, 232-233 (Or. 1987) ("the available authority is almost unanimous in holding that polygraph results may not be introduced into evidence upon the motion of either party"); *State* v. *Miller*, 522 A.2d 249, 260 (Conn. 1987) (adhering to "traditional rule * * * that polygraph results are per se inadmissible when offered by either party, either as to substantive evidence or as related to the credibility of the witness"); see also *Robinson* v. *Commonwealth*, 341 S.E.2d 159, 167 (Va. 1986).



The rule excluding polygraph evidence has traditionally had broad support in the federal courts of appeals as well. See P. Giannelli & E. Imwinkelreid, *Scientific Evidence* 232-235 (2d ed. 1993) (noting that a majority of federal courts, like their state counterparts, "follow[s] the traditional rule, holding polygraph evidence inadmissible per se") (collecting authorities). Several courts of appeals have retreated from that categorical position since this Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), which held that, under Federal Rule of Evidence 702, expert testimony may not be excluded solely because it is based on a scientific theory that has not yet achieved "general acceptance," as was formerly required under *Frye* v. *United States* 293 F. 1013 (D.C. 1923). See, *e.g.*, *United States* v. *Cordoba*, No. 95-50492 (9th Cir. Jan. 7, 1997), slip op. 102-103; *United States* v. *Posado*, 57 F.3d 428 (5th Cir. 1995); compare *United States* v. *Sherlin*, 67 F.3d 1208, 1216-1217 (6th Cir. 1995) (polygraph evidence generally inadmissible under Fed. R. Evid. 403), cert. denied, 116 S. Ct. 795, and 116 S. Ct. 1548 (1996). No court, however, has suggested that such a "case by case" approach to polygraph evidence is required by the Constitution.

To the contrary, the courts of appeals consistently have rejected the proposition that a rule that categorically excludes polygraph evidence violates the constitutional rights of criminal defendants. See *Jackson* v. *Garrison*, 677 F.2d 371, 373 (4th Cir.) (state court, in declining to admit favorable result of test administered by law-enforcement agent, "did not negate the fundamental fairness of [his] trial or violate a specific constitutional right"), cert. denied, 454 U.S. 1036 (1981); *Bashor* v. *Risley*, 730 F.2d

1228, 1238 (9th Cir.) (because jury could determine witness's credibility from his demeanor, "[e]xclusion of the polygraph evidence did not result in an unfair trial"), cert. denied, 469 U.S. 838 (1984); *United States* v. *Gordon*, 688 F.2d 42, 44-45 (8th Cir. 1982) (rejecting "argument that refusal to admit [polygraph] test results amounts to a denial of due process"). In ruling that the Constitution forbids a categorical rule barring polygraph evidence—and by thus requiring a case-by-case analysis of such evidence whenever offered by a testifying defendant—the Court of Appeals for the Armed Forces has departed from the uniform course of lower court decisions.

2. The court of appeals' analysis finds no support in this Court's Sixth Amendment jurisprudence. By protecting the defendant's right to confront the witnesses against him, to present the testimony of his own witnesses, and to enjoy the assistance of counsel, the Sixth Amendment spells out "the basic elements of a fair trial." *Strickland* v. *Washington*, 466 U.S. 668, 684-685 (1984); *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986). Those Sixth Amendment rights guarantee that the defendant in a criminal case has a fair opportunity to present his version of the facts so that the factfinder "may decide where the truth lies." *Washington* v. *Texas*, 388 U.S. 14, 19 (1967).

As this Court has recognized, however, a defendant "does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor* v. *Illinois*, 484 U.S. 400, 410 (1988); *Washington* v. *Texas*, 388 U.S. at 23. Accordingly, testimony may be excluded "through the application of evidentiary rules that themselves serve the interests of fairness



and reliability—even if the defendant would prefer to see that evidence admitted." *Crane* v. *Kentucky*, 476 U.S. at 690. Indeed, as Judge Crawford noted below (App., *infra*, 21a), eight Justices expressly reaffirmed that principle last Term in *Montana* v. *Egelhoff*, 116 S. Ct. 2013 (1996); the Court divided only on the question whether the interest asserted by Montana met that test. See *id.* at 2022 (plurality opinion of Scalia, J.); *id.* at 2028-2029 (O'Connor, J., dissenting) (arguing that Montana improperly barred intoxication evidence for the sole purpose of increasing convictions, whereas "[t]he *purpose* of the familiar evidentiary rules is * * * to vindicate some other goal or value—*e.g.*, to ensure the reliability and competency of evidence"); see also *id.* at 2032 (Souter, J., dissenting) ("A State may typically exclude even relevant and exculpatory evidence if it presents a valid justification for doing so").

This Court has stated that evidentiary restrictions on the presentation of defense evidence are constitutionally suspect only when they are arbitrary or disproportionate to the legitimate interests they are designed to serve. See, *e.g.*, *Rock* v. *Arkansas*, 483 U.S. 44, 55-56 (1987). That cannot be said of Rule 707. That rule addresses polygraph evidence that purports to gauge the credibility of witnesses; yet since time immemorial our system has entrusted credibility determinations to the judgment of juries, which assess credibility in reliance on their commonsense evaluations of demeanor, bias, and the plausibility of the narrative. It is entirely legitimate for an evidentiary system to preserve for the factfinder its unique province of assessing credibility based on first-hand observation of the testifying witness.

At the same time, a scientific technique whose reliability and helpfulness are widely questioned by

scientists and courts alike may surely be made the subject of a categorical exclusionary rule. An evidentiary system that excludes such evidence need not take sides in a scientific debate; it need only recognize, as the President did in promulgating Rule 707, that the technique's lack of broad acceptance will result in time-consuming collateral litigation designed to ensure that the factfinder is not confused or unduly swayed by the purported scientific basis that supports it. In such circumstances, exclusion of evidence based on that technique furthers the truth-finding function of the trial; it does not violate the Sixth Amendment.

3. The constitutional principle embraced by the court of appeals not only conflicts with a longstanding rule of evidence followed by state and federal civilian courts—and still followed by many courts today—but the costs imposed by that novel principle are particularly unwarranted and onerous in the military context.

As this Court has recognized, "the military in important respects remains a 'specialized society separate from civilian society,'" *Weiss* v. *United States*, 510 U.S. 163, 174 (1994) (quoting *Parker* v. *Levy*, 417 U.S. 733, 743 (1974)); see also *Loving* v. *United States*, 116 S. Ct. 1737, 1751 (1996), whose essential function is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955); see also *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975). Military trials are necessary "to maintain discipline," but they are "merely incidental to an army's primary fighting function." *Quarles*, 350 U.S. at 17. "To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not



served." *Ibid.* Thus, the introduction of procedural complexities into military trials is "a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline." *Middendorf* v. *Henry*, 425 U.S. 25, 45-46 (1976).

The court of appeals' opinion does not reflect consideration of those factors, which have long informed this Court's assessment of rules designed for military trials. Nor does that decision reflect the great deference properly due to the judgments of the political branches in this area. See, *e.g.*, *Weiss*, 510 U.S. at 177; *Goldman* v. *Weinberger*, 475 U.S. 503, 508 (1986). Invoking his powers under the Constitution, see U.S. Const., Art. II, § 2, Cl. 1, and an express congressional delegation authorizing him to prescribe rules of evidence for courts-martial, see 10 U.S.C. 836(a), the President concluded that polygraph evidence is unnecessary for reliable credibility assessments, that its admission could confuse court-members, and that case-by-case litigation about its admissibility would waste the time of servicemembers whose "primary * * * function" (*Quarles*, 350 U.S. at 17) is elsewhere. The court of appeals' conclusion that the President's judgment contravenes the Sixth Amendment warrants this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER DELLINGER
*Acting Solicitor General*

JOHN C. KEENEY
*Acting Assistant Attorney General*

MICHAEL R. DREEBEN
*Deputy Solicitor General*

MIGUEL A. ESTRADA
*Assistant to the Solicitor General*

MICHAEL J. BRESLIN
*Lt. Colonel, USAF*

JANUARY 1997

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

---

No. 95-0521

Crim. App. No. 30304

UNITED STATES, APPELLEE

*v.*

EDWARD G. SCHEFFER, Airman
U.S. Air Force, APPELLANT

---

Argued May 8, 1996
Decided Sep. 18, 1996

---

### OPINION OF THE COURT

GIERKE, Judge:

A general court-martial composed of officer members at March Air Force Base, California, convicted appellant, contrary to his pleas, of uttering bad checks, wrongfully using methamphetamine, failing to go to his appointed place of duty, and absenting himself from his unit (13 days), in violation of Articles 123a, 112a, and 86, Uniform Code of Military

Justice, 10 USC §§ 923a, 912a, and 886, respectively. The adjudged and approved sentence provides for a bad-conduct discharge, confinement for 30 months, total forfeitures, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence but awarded one day of credit against his sentence to forfeitures (confinement had expired) for lack of timely pretrial confinement review, relying on *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *United States v. Rexroat*, 38 MJ 292 (CMA 1993). *See* 41 MJ 683, 693 (1995).

We granted review of the following issue:

> WHETHER THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO PRESENT EVIDENCE OF A FAVORABLE POLYGRAPH RESULT CONCERNING HIS DENIAL OF USE OF DRUGS WHILE IN THE AIR FORCE.

In March of 1992, appellant began working as an informant for the Air Force Office of Special Investigations (OSI). During late March and early April, appellant told OSI that two civilians, Davis and Fink, were dealing in significant quantities of drugs. On April 7, 1992, at the request of OSI, appellant voluntarily provided a urine sample. Periodic urinalyses are normal procedure for controlled informants.

On April 10, OSI asked appellant to submit to a polygraph examination. The OSI polygraph examiner asked appellant three questions: (1) Had he ever used drugs while in the Air Force; (2) Had he ever lied in any of the drug information he gave to OSI; and (3) Had he told anyone other than his parents that he was assisting OSI? Appellant answered "No"



to each question. The polygraph examiner concluded that "no deception" was indicated.

Appellant's urinalysis tested positive for methamphetamine. The report was dated May 20, although local OSI agents may have learned of the results as early as May 14.

At trial appellant asked the military judge for an opportunity to lay a foundation for the favorable polygraph evidence. The military judge denied the request without receiving any evidence, ruling that "the President may, through the Rules of Evidence, determine that credibility is not an area in which a factfinder needs help, and the polygraph is not a process that has sufficient scientific acceptability to be relevant." He further ruled that under Mil.R.Evid. 403, Manual for Courts-Martial, United States (1995 ed.),

> [t]he factfinder might give it too much weight, and that there is an inordinate amount of time and expense, especially in the cases where there may be conflicting tests, which doesn't appear to be the case here. The main confusion of the issue; that is, the question of what the result of the polygraph was, as opposed to the question of whether or not the accused used drugs.

During the trial on the merits, appellant testified that he visited Davis on April 6, left Davis' house around midnight, and began driving toward March Air Force Base. The next thing he remembered was waking up the next morning in his car in a remote area, not knowing how he got there. He denied "knowingly" ingesting drugs at any time between March 5, when he began working for OSI, and April

7, the date he provided the urine sample that tested positive for methamphetamine.

Trial counsel cross-examined appellant about inconsistencies between his trial testimony and earlier statements to the OSI, and his lack of a "sudden rush of energy" and other symptoms of ingesting methamphetamine. Trial counsel's closing argument urged the court members to look at appellant's credibility. Trial counsel argued, "He lies. He is a liar. He lies at every opportunity he gets and he has no credibility. Don't believe him. He knowingly used methamphetamine, and he is guilty of Charge II."

Appellant asserts that Mil.R.Evid. 707 violates his Sixth Amendment right to present a defense because it compelled the military judge to exclude relevant, material, and favorable evidence offered by appellant. He argues that he was constitutionally entitled to be given an opportunity to rebut the attack on his credibility as a witness by laying a foundation for favorable polygraph evidence. The Government asserts that the Rule does not impermissibly infringe on the Sixth Amendment. It argues that Mil.R.Evid. 707 merely codifies all the evidentiary prohibitions against polygraph evidence and that, even without Mil.R.Evid. 707, polygraph evidence would never be admissible. We agree with appellant.

In *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), polygraph evidence was held to be inadmissible because it was unreliable. In *United States v. Gipson* 24 MJ 246, 253 (1987), our Court held that an accused is "entitled to attempt to lay" the foundation for admission of favorable polygraph evidence. In arriving at that holding, our Court acknowledged that Mil.R.Evid. 702 "may be broader and may supersede *Frye v. United States*," *supra*. 24 MJ at 252.



The impact of our *Gipson* decision was short-lived, however, because on June 27, 1991, the President promulgated Mil.R.Evid. 707 in Executive Order No. 12767, § 2, 56 Fed. Reg. 30296.

Mil.R.Evid. 707 provides: "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." Unlike most military rules of evidence, Mil.R.Evid. 707 has no counterpart in the Federal Rules of Evidence. It is similar to Cal.Evid. Code 351.1 (West 1988 Supp.). *See People v. Kegler*, 197 Cal. App. 3d 72, 84, 242 Cal. App. 897, 905 (1987). Mil.R.Evid. 707 "is not intended to accept or reject *United States v. Gipson*, 24 MJ 246 (CMA 1987), concerning the standard for admissibility of other scientific evidence under Mil.R.Evid. 702 or the continued vitality of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)." Drafters' Analysis of Mil. R.Evid. 707, Manual, *supra* (1995 ed.) at A22-48.

Presidential authority to promulgate rules of evidence is founded on Article 36(a), UCMJ, 10 USC § 836(a). That Article provides that such rules "shall, so far as [The President] considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter."

Appellant's case presents two questions. The first is a statutory question: did the President comply with Article 36 when he promulgated Mil.R.Evid. 707. The second is a constitutional question: does Mil.R. Evid. 707 violate the Sixth Amendment. We review

these questions of law *de novo*. *United States v. Ayala*, 43 MJ 296, 298 (1995).

The statutory question was neither briefed nor argued. It may well be that the *per se* prohibition in Mil.R.Evid. 707 is "at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.'" *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588, 113 S.Ct. 2786, 2794 (1993). We note that the majority of the federal circuits do not have a *per se* prohibition against polygraph evidence. Instead, they rely on the trial judge to apply a *Daubert* analysis and apply Fed. R. Evid. 401-03. *United States v. Pulido*, 69 F.3d 192, 205 (7th Cir. 1995) (no *per se* rule against admissibility of polygraph evidence); *see United States v. Posado*, 57 F.3d 428, 436 (5th Cir. 1995) (reversing *per se* exclusion of polygraph evidence); *United States v. Piccinonna*, 885 F.2d 1529, 1535 (11th Cir. 1989) (holding that polygraph evidence not inadmissible *per se*); *Anderson v. United States*, 788 F.2d 517, 519 n. 1 (8th Cir. 1986) (polygraph evidence admissible by stipulation); *see also United States v. A & S Council Oil Co.*, 947 F.2d 1128, 1134 n. 4 (4th Cir. 1991) (holding that polygraph evidence not admissible in 4th Circuit but recognizing that "[c]ircuits that have not yet permitted evidence of polygraph results for any purpose are now the decided minority"). *But see United States v. Scarborough*, 43 F.3d 1021, 1026 (6th Cir. 1994) (polygraph results "inherently unreliable"); *United States v. A & S Council Oil Co., supra* (polygraph evidence not admissible); *United States v. Soundingsides*, 820 F.2d 1232, 1241 (10th Cir. 1987) (polygraph evidence "not admissible to show" that witness "is truthful"); *United States v.*



*Skeens*, 494 F.2d 1050, 1053 (D.C. Cir. 1974) (adhering to *Frye* and holding polygraph evidence inadmissible); *Dowd v. Calabrese*, 585 F.Supp. 430 (D. D.C. 1984) (polygraph results not sufficiently reliable to be admissible).

The Federal rules are virtually identical to Mil.R. Evid. 401-03. Whether the President determined that prevailing federal practice is not "practicable" for courts-martial cannot be determined from the record before us. Assuming without deciding that the President acted in accordance with Article 36 and determined that the prevailing federal rule is not "practicable" for courts-martial, we turn to the constitutional question.

Our Court entertained a direct attack on the constitutionality of Mil.R.Evid. 707 in *United States v. Williams*, 43 MJ 348 (1995). We held, however, "that the accused had no right to introduce the polygraph evidence without taking the stand and testifying consistently, or without offering some other plausible evidentiary basis." 43 MJ at 355. *See also United States v. Abeyta*, 25 MJ 97, 98 (CMA 1987) (polygraph evidence not relevant unless accused testifies). In *Williams* we observed: "Thus, in the appropriate case, the question will be whether the proffered polygraph evidence is sufficiently reliable and necessary that its automatic exclusion violates the accused's constitutional trial rights." 43 MJ at 353.

Unlike Williams, this appellant testified, placed his credibility in issue, and was accused by the prosecution of being a liar. Thus the constitutional issue is squarely presented. We hold that Mil.R.Evid. 707, as applied to this case, is unconstitutional. A *per se* exclusion of polygraph evidence, offered by an accused to rebut an attack on his credibility, without

giving him an opportunity to lay a foundation under Mil.R.Evid. 702 and *Daubert*, violates his Sixth Amendment right to present a defense. We limit our holding to exculpatory evidence arising from a polygraph examination of an accused, offered to rebut an attack on his credibility. We leave for another day other constitutional questions such as those involving government-offered polygraph evidence or evidence of a polygraph examination of a witness other than an accused.

The Sixth Amendment grants an accused "the right to call 'witnesess in his favor.'" *Rock v. Arkansas*, 483 U.S. 44, 52 (1987). An accused's right to present testimony that is relevant and material may not be denied arbitrarily. *Washington v. Texas*, 388 U.S. 14, 23 (1967); *see United States v. Woolheater*, 40 MJ 170, 173 (CMA 1994).

The right to present evidence, however, is not unlimited, but "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). *See, e.g., Washington v. Texas*, 388 U.S. at 23 n. 21 (right to present testimony may be limited by testimonial privileges or rules relating to mental ability to testify). When restrictions are placed on an accused's right to present evidence, they "may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock v. Arkansas*, 483 U.S. at 56. Applying the foregoing principles, the Supreme Court held in *Rock* that a *per se* rule excluding the defendant's hypnotically refreshed testimony infringed his right to present a defense. The Supreme Court held that a "legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case."



483 U.S. at 61. While *Rock* concerned exclusion of a defendant's testimony and this case concerns exclusion of evidence supporting the truthfulness of a defendant's testimony, we perceive no significant constitutional difference between the two. In either case, the Sixth Amendment right to present a defense is implicated.

Mil.R.Evid. 702 permits expert testimony when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Expert testimony is subject to the relevance requirements of Mil.R.Evid. 401 and 402 and the balancing requirements of Mil. R.Evid. 403. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 597, 113 S.Ct. at 2798, the Supreme Court made the trial judge a gatekeeper, trusted with responsibility to decide if novel scientific evidence was sufficiently relevant and reliable to warrant admission.

An expert witness may not testify that a declarant was telling the truth, but may testify to the absence of indicia of deception. Thus, in *United States v. Cacy*, 43 MJ 214, 218 (1995), we held that it was not error to permit an expert to testify that a victim's accusation did not appear to be feigned or rehearsed. Similarly, in *United States v. Suarez*, 35 MJ 374, 376 (CMA 1992), we held that it was not error for an expert to opine that counter-intuitive conduct, such as recanting an accusation, inconsistent statements, or failing to report abuse is not necessarily inconsistent with a truthful accusation. *See also United States v. Houser*, 36 MJ 392, 398-400 (CMA 1993). Finally, we have permitted experts to opine whether a complainant "can differentiate between fantasy and fact." *United States v. Palmer*, 33 MJ 7, 12 (CMA

1991); *United States v. Tolppa*, 25 MJ 352, 354-55 (CMA 1987), *citing United States v. Azure*, 801 F.2d 336, 340 (8th Cir. 1986). Under the same rationale as these cases, a properly qualified expert, relying on a properly administered polygraph examination, may be able to opine that an accused's physiological responses to certain questions did not indicate deception.

Polygraph examinations were relatively crude when *Frye* was decided. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 585, 113 S.Ct. at 2793. The Eleventh Circuit has recognized that, "[s]ince the *Frye* decision, tremendous advances have been made in polygraph instrumentation and technique." *United States v. Piccinonna*, 885 F.2d 1529, 1532 (11th Cir. 1989); *see also United States v. Galbreth*, 908 F. Supp. 877 (D. N.M. 1995); *United States v. Crumby*, 895 F. Supp. 1354 (D. Ariz. 1995). The effect of Mil.R. Evid. 707 is to freeze the law regarding polygraph examinations without regard for scientific advances. We believe that the truth-seeking function is best served by keeping the door open to scientific advances. *See United States v. Youngberg*, 43 MJ 379 (1995) (holding DNA evidence admissible); *United States v. Nimmer*, 43 MJ 252, 260 (1995) (remanding for hearing on reliability of hair analysis evidence). With respect to appellant's case, we like the Fifth Circuit, cannot determine "whether polygraph technique can be said to have made sufficient technological advance in the seventy years since *Frye* to constitute the type of 'scientific, technical, or other specialized knowledge' envisioned by Rule 702 and *Daubert*." *United States v. Posado*, 57 F.3d at 433. We will never know, unless we give appellant an opportunity to lay the foundation.



Like the Court in *Posado*, "We do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the *per se* rule against admissibility." 57 F.3d at 434. Foundation evidence for proffered polygraph evidence must establish that the underlying theory—that a deceptive answer will produce a measurable physiological response—is scientifically valid. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 592-93. Furthermore, we would expect evidence that the theory can be applied to appellant's case. *Id.* The foundation must include evidence that the examiner is qualified, that the equipment worked properly and was properly used, and that the examiner used valid questioning techniques.

As required by *Daubert*, the military judge must be a gatekeeper and weigh probative value against prejudicial impact in accordance with Mil. R. Evid. 403. We find the *Piccinonna* guidance apt:

> [T]he trial court may exclude polygraph expert testimony because 1) the polygraph examiner's qualifications are unacceptable; 2) the test procedure was unfairly prejudicial or the test was poorly administered; or 3) the questions were irrelevant or improper. The trial judge has wide discretion in this area, and rulings on admissibility will not be reversed unless a clear abuse of discretion is shown.

885 F.2d at 1537; *see also United States v. Pettigrew*, 77 F.3d 1500, 1514 (5th Cir. 1996) (judge's ruling on admissibility of polygraph evidence reviewed for abuse of discretion).

This was not a private, *ex parte* examination under unknown conditions. *See United States v. Sherlin*, 67 F.3d 1208, 1217 (6th Cir. 1995) ("unilaterally" obtained and "privately commissioned" polygraph excluded). To the contrary, appellant proffers a government-intiated examination by an OSI examiner. Accordingly, there would appear to be no need to condition admissibility on having appellant examined by a polygraph examiner chosen by the prosecution. *See United States v. Piccinonna*, 885 F.2d at 1536.

Finally, the issues raised by the dissenting opinion warrant comment. Both *Wood v. Bartholomew*, 116 S.Ct. 7 (1995), and *State v. Ellison*, 676 P.2d 531, 535 (Wash. App. 1984), involve polygraph examinations of prosecution witnesses, not the accused. Our holding, as was that in *Rock*, is limited to an accused's right to lay the foundation for a polygraph examination of himself. We need not and do not address admissibility of polygraph examinations of government witnesses or the question whether such polygraph evidence would be constitutionally required to be disclosed under *Brady v. Maryland*, 373 U.S. 83 (1963). *But cf. United States v. Simmons*, 38 MJ 376 (CMA 1993) (trial counsel failed to discover and disclose contradictory statements of rape prosecutrix made to government polygrapher).

Furthermore, *Bartholomew* involves an issue different from the one in the case before us. It is summary disposition of a habeas corpus case, where the Supreme Court concluded that the Ninth Circuit misapplied the Court's *Brady* jurisprudence. 116 S.Ct. at 8. The Supreme Court noted that polygraph evidence was inadmissible under Washington state law, but premised its holding on the speculative nature of



the additional evidence that might have been discovered, counsel's concession "that disclosure would not have affected the scope of his cross-examination," and the "overwhelming" evidence of guilt. 116 S.Ct. at 10-11. The constitutionality of the state law was not before the Court and therefore, consistent with the Court's practice, it was not addressed. *See United Public Workers of America v. Mitchell*, 330 U.S. 75, 90 n. 22 (1947) ("It has long been this Court's considered practice not to decide abstract, hypothetical or contingent questions, . . . or to decide any constitutional question in advance of the necessity for its decision, . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied.' ")

*Montana v. Egelhoff*, 116 S.Ct. 2013 (1996), also involves a constitutional issue different from the one before us. *Egelhoff* involves legislative action redefining an element of an offense, not executive rulemaking about modes of proof. The President, unlike the Montana legislature, lacks authority to create and define offenses. *See* Art. 36(a), UCMJ, 10 USC § 836(a); *United States v. Hemingway*, 36 MJ 349, 351 (CMA 1993); *United States v. Smith*, 13 USCMA 105, 119, 32 CMR 105, 119 (1962).

In *Egelhoff*, the Supreme Court upheld a statute excluding evidence of voluntary intoxication when a defendant's state of mind is at issue. The statute in question, Mont. Code Ann. § 45-2-203, provided that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense." 116 S.

Ct. at 2016. The Supreme Court's decision is fragmented, with four justices speaking in the plurality opinion, joined by Justice Ginsburg who concurred in the judgment separately; and four other Justices dissented in three separate opinions.

We read the holding in *Egelhoff* as founded on the power of the state to define crimes and defenses. The Montana statute was based on a legislative decision to resurrect "the common-law rule prohibiting consideration of voluntary intoxication" in determining whether the defendant had the requisite *mens rea.* 116 S. Ct. at 2020. In short, Montana decided to preclude voluntary intoxication from being asserted as a defense. The plurality explained:

> "The doctrines of *actus reus, mens rea,* insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States." *Powell v. Texas,* 392 U.S. 514, 535-536 (1968) (plurality opinion). The people of Montana have decided to resurrect the rule of an earlier era, disallowing consideration of voluntary intoxication when a defendant's state of mind is at issue. Nothing in the Due Process Clause prevents them from doing so, and the judgment of the Supreme Court of Montana to the contrary must be reversed.

116 S. Ct. at 2023-24.



The Montana rule excludes evidence based on the fact to be proven (voluntary intoxication) rather than on the mode of proof. Abolishing a defense is within the authority of a state legislature. On the other hand, Mil.R.Evid. 707 bars otherwise admissible and relevant evidence based on the mode of proof by categorically excluding polygraph evidence. While the plurality opinion in *Egelhoff* questions whether the distinction between the fact to be proved and the method of proving it makes a difference, 116 S. Ct. at 2017 n. 1, only four Justices joined in that observation.

Justice Ginsburg points out in her separate concurrence in *Egelhoff* that the statute does not appear among Montana's evidentiary rules, but in the chapter pertaining to substantive crimes. She opines that the Montana law is "a measure redefining *mens rea,*" and as such is well within the power of a state to define crimes. 116 S. Ct. at 2024-25. The four Justices in the plurality opinion state that they are "in complete agreement" with Justice Ginsburg's analysis. They explain that they "address [the statute] as an evidentiary statute simply because that is how the Supreme Court of Montana chose to analyze it." 116 S. Ct. at 2020-21 n. 4. Justice Ginsburg, along with the four dissenters, recognized that "a rule designed to keep out 'relevant, exculpatory evidence' . . . offends due process." 116 S. Ct. at 2024, 2029.

Finally, we must comment on the dissenter's "floodgate" arguments that our opinion will generate an unreasonable burden on the services. 44 MJ at 451 [App., *infra,* 21a-22a]. Apart from the speculative nature of such an argument, we think that it is just as likely that polygraph evidence will prevent needless litigation by avoiding some meritless prosecutions

as well as smoking out bogus claims of innocent ingestion. Furthermore, we are unaware of any such flood of polygraph cases after our decision in *United States v. Gipson, supra.* Finally, our measure should be the scales of justice, not the cash register.

Decision

The decision of the United States Air Force Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Air Force for submission to an appropriate convening authority for a hearing before a military judge. Appellant will be provided an opportunity to lay a foundation for admission of the proffered polygraph evidence. If the military judge decides that the polygraph evidence is admissible, he will set aside the findings of guilty and the sentence, and a rehearing may be ordered. If the military judge decides that the polygraph evidence is not admissible, he will make findings of fact and conclusions of law. The record will be sent directly to the Court of Criminal Appeals for expeditious review. Thereafter, Article 67, UCMJ, 10 USC § 867 (1989), will apply.

Chief Judge COX and Senior Judge EVERETT concur.

SULLIVAN, Judge (dissenting):

I dissent for the reasons stated in my separate opinion in *United States v. Williams*, 43 MJ 348, 356-57 (1995) (Sullivan, C.J., concurring in the result).



CRAWFORD, Judge (dissenting):

We have held that "[t]he defendant has the right to present legally and logically relevant evidence at trial." *United States v. Woolheater*, 40 MJ 170, 173 (CMA 1994). But as all the Judges of this Court agreed in *Woolheater*, this is "not [an] absolute" right, *id.*; *see also Montana v. Egelhoff*, 116 S. Ct. 2013, 2017, 2026 (1996); and may yield to valid "policy considerations," 40 MJ at 173; *id.*; *United States v. Bins*, 43 MJ 79, 83 (1995) (citing *Woolheater*, 43 MJ at 84); *United States v. Schaible*, 11 USCMA 107, 111, 28 CMR 331, 335 (1960).

None of the cases cited by the majority hold that there is a constitutional right to admit an exculpatory polygraph examination. Assuming polygraphs are relevant and reliable, there is ample justification for Mil.R.Evid. 707, Manual for Courts-Martial, United States (1995 ed.). This justification satisfies the provisions of Article 36(a), Uniform Code of Military Justice, 10 USC § 836(a), that the rules of procedure and evidence "generally recognized" in federal trials be applied to courts-martial "so far as he [The President] considers practicable."

Through dicta and implicit holdings the Supreme Court has signaled that there is no constitutional right to introduce polygraph evidence. Exclusion of exculpatory evidence does not contravene fundamental "principle[s] of justice . . . rooted in the traditions and conscience of our" society. *Patterson v. New York*, 432 U.S. 197, 202 (1977).

In *McMorris v. Israel*, 643 F.2d 458 (1981), the Court of Appeals for the Seventh Circuit stated that "polygraph evidence [may be] materially exculpatory within the meaning of the Constitution." 643

F.2d at 462. In dissenting to the denial of *certiorari* in that case, then-Justice Rehnquist characterized *McMorris* as a "dubious constitutional holding." *Israel v. McMorris*, 455 U.S. 967, 970 (1982).

In *Wood v. Bartholomew*, 116 S. Ct. 7 (1995), the Court summarily denied habeas corpus for the prosecution's failure to disclose information pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). The basis for the defense allegation was that the prosecution failed to reveal polygraph examinations and statements by the defendant's brother and his girlfriend, the two key prosecution witnesses at trial.[1] These polygraphs and their statements would have undermined the witnesses' testimony at trial and supported the defense theory.

The defendant's brother testified at trial that, while he and his brother sat in the car in the laundromat parking lot, the defendant said "that he intended to rob the laundromat and 'leave no witnesses.'" The prosecution offered evidence that both the brother and girlfriend left a short while later and went to the girlfriend's house. The girlfriend also testified that when the defendant arrived at her house, he told her that he "put two bullets in the kid's head." She also heard the defendant "say that he intended to leave no witnesses." 116 S.Ct. at 8-9.

At trial the defendant testified that he forced the attendant "to lie down on the floor." While removing the cash, he "accidentally fired" a bullet into the victim's head. The defendant "denied telling" his brother

[1] This Court in the past has looked at *Brady v. Maryland*, 373 U.S. 83 (1963), and its military counterpart as to its impact on prosecution witnesses as in *Wood v. Bartholomew*, 116 S.Ct. 7 (1995), and reversed a conviction. *United States v. Simmons*, 38 MJ 376, 380-82 (CMA 1993).



and the girlfriend "that he intended to leave no witnesses." Moreover, he said that his brother "assisted" him. 116 S.Ct. at 9.

Under Washington State law, polygraph evidence is inadmissible. *State v. Ellison*, 676 P.2d 531, 535 (Wash. App. 1984). Even so, prior to trial, the prosecution requested that the two key witnesses take a polygraph examination. The polygrapher noted that the girlfriend's answers to the "questions were inconclusive." The polygrapher asked the defendant's brother whether (1) he had "assisted" in the robbery, and (2) whether at any time he was with his brother in the laundromat. The examiner said that his negative responses showed "deception." The prosecution did not disclose these examinations to defense counsel. 116 S.Ct. at 9. In denying relief because of failure to disclose the polygraph examinations, the Supreme Court noted that, during the habeas corpus hearing, "counsel obtained no contradictions or admissions" from the defendant's brother. 116 S. Ct. at 11. Clearly, if polygraph examinations were admissible, polygraph results would have impeached the witnesses. *Thus, the results on appeal would have been different.*

The implicit holding in *Wood* has been reinforced in *Montana v. Egelhoff*, 116 S.Ct. 2013 (1996). In *Egelhoff* the Supreme Court held that a state may exclude evidence of voluntary intoxication as it relates to the *mens rea* element of a criminal offense. When interpreting Supreme Court decisions, it is instructive and helpful to look beyond the specific holding to the debate of broader principles of jurisprudence.

In *Egelhoff*, eight Justices agreed that there may be valid policy reasons to exclude relevant, reliable

evidence. 116 S. Ct. at 2017, 2026. While the eight Justices debated the *"Chambers principle," id.* at 2022, Justice Ginsburg, concurring in the judgment, looked "[b]eneath the labels" in concluding that a state legislature's redefinition of *mens rea* "encounters no constitutional shoal." *Id.* at 2024.

Justice Scalia, speaking for four other Justices, described *Chambers* as a "highly case-specific error correction" case as well as a "fact-intensive case." He concluded that there is no violation of a defendant's right to defense "whenever 'critical evidence' favorable to him is excluded"; on the other hand, "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation." *Id.* at 2022. The plurality then emphasized that Fed.R.Evid. 403 and 802 result in exclusion of relevant, reliable evidence. *Id.* at 2017.

Justice O'Connor, dissenting and joined by three other Justices, agreed the "defendant does not enjoy an absolute right to present evidence relevant to his defense." *Id.* at 2026. Her dissent rejected the plurality argument that because evidence of voluntary intoxication was excluded at common law, it should be excluded in this case. *Id.* at 2029-31. Justice O'Connor asserted that to exclude the evidence would prohibit a defendant from having a "fair opportunity to put forward his defense." *Id.* at 2031. She emphasized that this concept was "universally applicable." *Id.* at 2030. In any event, she concluded that the state had not set forth "sufficient justification," *id.* at 2027, to exclude involuntary intoxication to negate the mental element of a defense. She agreed with Justice Ginsburg that a state could redefine an offense to render "voluntary intoxication irrelevant,"



but concluded that the State of Montana did not evidence such an intent. *Id.* at 2031. Justice O'Connor also rejected the plurality characterization of *Chambers. Id.* at 2026-27.

Justice Souter agreed that the "plurality opinion convincingly demonstrates that . . . the common law . . . rejected the notion that voluntary intoxication might be exculpatory, or was at best in a state of flux. . . ." *Id.* at 2032 (citation omitted). Thus, a state may "exclude even relevant and exculpatory evidence if it presents a valid justification for doing so." *Id.* at 2032.

However, in separate opinions, Justices Breyer and Souter stated that the State of Montana had not provided for exclusion of voluntary intoxication from the *mens rea* element of an offense. In summary, in *Egelhoff* eight Justices of the Court recognized that relevant, reliable evidence may be excluded if there is a valid policy reason for doing so.

Mil.R.Evid. 707 was "based on several policy grounds." The policy grounds set forth in the Analysis are not exclusive. These grounds include the risk of being treated with "near infallibility"; "danger of confusion of the issues"; and waste of time on collateral matters. Drafters' Analysis, Manual, *supra* (1995 ed.) at A22-48.

An additional policy concern is the impact in terms of practical consequences. Unfortunately, the majority overlooks the practical consequences of its decision on a worldwide system of justice. Our Court sees the cases that are at the end of a long funnel. There are approximately 4,000 general courts-martial per year. Annual Report, 39 MJ CXLVII, CLIX, CLXXIV, CLXXVII (1992-93). However, across the services, there are approximately 100,000 criminal actions per

year. Statistically more than 20 percent of these involve drug cases like the present case. The majority fails to recognize that a concomitant right of presenting polygraph evidence is the right to demand a polygraph examination during the investigative stage. This may well impose a practical impossibility on the services. Additionally, if an individual were accused of a minor crime for which she was to be given a captain's mast, she could claim a right to a polygraph examination.[2] Thus, the practical policy consequences set forth in the analysis established a valid governmental interest in precluding admissibility of polygraph examinations. This rule is not inconsistent with the rule in the Federal courts.

Professors Giannelli and Imwinkelried state, "A majority of jurisdictions follow the traditional rule, holding polygraph evidence inadmissible per se." P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 8-3 (A) at 232 (2d ed. 1993 and 1995) (citing many cases). Further, "[a] substantial minority of courts admit polygraph evidence upon stipulation of the parties." *Id.* § 8-3(B) at 236. But "[a] few courts recognize a trial court's discretion to admit polygraph evidence even in the absence of a stipulation." *Id.* § 8-3(C) at 240.

While the Federal courts are split as to admissibility of polygraphs, some, like *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995), have admitted poly-

[2] *See, e.g., United States v. Bass*, 11 MJ 545 (ACMR 1981) (refusal to accept Article 15 resulted in a general court-martial and 8 years' confinement. There have been other instances where Article 15a have resulted in more serious dispositions. *See, e.g., United States v. Brock*, No. 96-0673, *pet. granted* (July 12, 1996); *United States v. Zamberlan*, 44 MJ 69 (1996).



graph evidence at supression hearings or pursuant to a stipulation. *United States v. Piccinonna*, 885 F.2d 1529, 1536 (11th Cir. 1989). This is not unlike admitting hearsay at suppression hearings. In any event, the Federal courts have not faced the issue of a rule precluding admissibility of polygraph evidence in a worldwide system of justice. California, which does have a rule similar to the military and applies the *Kelly-Frye* (so named after *People v. Kelly*, 549 P.2d 1240 (Cal. 1976), and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)) test, has held that there is no constitutional right to introduce exculpatory polygraph examinations. *See, e.g., People v. Kegler*, 197 Cal. App. 3d 72, 84-90, 242 Cal. Rptr. 897, 905-09 (1987).

Since Mil.R.Evid. 707 is based on valid policy grounds, it satisfies the Constitution and the requirement in Article 36(a) that the rules of procedure and rules of evidence conform to those in Federal trials "so far as he [The President] considers practicable." If one carried the view of the majority to its logical conclusion, it calls into question various procedural and evidentiary rules. *See, e.g.*, Mil.R. Evid. 502-12 and 803(6); RCM 305(h)(2)(B). Unfortunately this path reminds me of earlier forays by this Court. *See, e.g., United States v. Larneard*, 3 MJ 76, 80, 83 (1977); *United States v. Heard*, 3 MJ 14, 20 n.12 (1977); *United States v. Hawkins*, 2 MJ 23 (1976); *United States v. Washington*, 1 MJ 473, 475 n.6 (1976). *But see United States v. Newcomb*, 5 MJ 4, 7 (CMA 1978) (Cook, J., concurring).

To the extent the majority suggests that *Egelhoff* is distinguishable because it involves a legislative act rather than rulemaking by an executive, I have two responses. First, just as the Supreme Court treats

Federal Rules of Criminal Procedure the same as statutes, so should we. *See, e.g., Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988). Second, in *Loving v. United States*, 116 S. Ct. 1737, 1748 (1996), the Supreme Court recognized that the President as Commander-in-Chief has been delegated "wide discretion and authority." The Court upheld the delegation of authority to the President to promulgate aggravating factors in a death penalty case. *Loving* left open the question the extent of The President's authority under Article 36 alone. *Id.* at 1749.

For the aforementioned reasons, I dissent.



**APPENDIX B**

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

---

ACM 30304
5 January 1995

UNITED STATES

v.

AIRMAN EDWARD G. SCHEFFER, FR554-85-0300
United States Air Force

---

EN BANC

DIXON, SNYDER, RAICHLE, HEIMBURG, YOUNG, PEARSON, SCHREIER, GAMBOA, and BECKER

---

OPINION OF THE COURT

YOUNG, Judge:

Contrary to his pleas, appellant was convicted of making and uttering 17 checks, totaling over $3,300 without sufficient funds in his account, wrongfully using methamphetamine, failing to go to his appointed place of duty, and a 13-day unauthorized absence. Articles 123a, 112a, and 86, UCMJ, 10 U.S.C. §§ 923a, 912a, 886 (1988). Court members sentenced

him to a bad-conduct discharge, confinement for 30 months, total forfeitures, and reduction to E-1. Appellant assigns three errors: (1) the military judge erred by refusing to admit into evidence the results of appellant's exculpatory polygraph examination; (2) the charges should have been dismissed for lack of a speedy trial; and (3) appellant is entitled to 5 days credit because his pretrial confinement was not reviewed by a neutral and detached magistrate within 48 hours of incarceration. We order appellant be given credit for 1 day of illegal pretrial confinement. We find no error which affects the findings or sentence.

## I. Admissibility of Polygraph Results

### *A. Facts*

Appellant, apparently on his own initiative, agreed to assist the Air Force Office of Special Investigations (AFOSI) with drug investigations. His AFOSI handlers advised appellant that from time to time they would ask him to provide urine specimens to be tested for drugs and to submit to polygraph examinations. On 7 April 1992, AFOSI Special Agent Shilaikis asked appellant if he would consent to a urinalysis. Appellant agreed, but declined to provide a urine sample until the following day. He claimed he only urinated one time a day, and he had already done so. He asked for, and received, permission to continue his undercover work that evening. The following day, he provided a urine specimen. On 10 April 1992, appellant took an AFOSI polygraph. During the examination, appellant answered "no" to the following relevant questions:



(1) Since you've been in the AF, have you used any illegal drugs?

(2) Have you lied about any of the drug information you've given OSI?

(3) Besides your parents, have you told anyone you're assisting OSI?

The examiner opined that appellant's polygraph charts "indicated no deception to the above questions." On approximately 14 May 1992, the AFOSI agents learned appellant's urine specimen had tested positive for methamphetamine.

### *B. The Issue*

At trial, appellant moved to admit the results of the polygraph despite the proscription of Mil. R. Evid. 707; the prosecution objected. The military judge ruled that the Constitution did not prohibit the President from promulgating a rule excluding polygraph evidence from admission in trials by courts-martial, and he denied appellant's request to lay a foundation for its admission. Appellant testified on his own behalf and denied knowingly using methamphetamine.

Mil. R. Evid. 707 provides:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.
>
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

According to the drafters' analysis, Mil. R. Evid. 707 is based on the following policy grounds: (1) the "danger court members will be misled by polygraph evidence that 'is likely to be shrouded with an aura of near infallibility' " (quoting *United States v. Alexander*, 526 F.2d 161, 168-69 (8th Cir. 1975)); (2) "to the extent that the members accept polygraph evidence as unimpeachable or conclusive, despite cautionary instructions from the military judge, the members' 'traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted' " (*Id.*); (3) the danger of confusion of the issues which "could result in the court-martial degenerating into a trial of the polygraph machine"; (4) presentation of polygraph evidence "can result in a substantial waste of time when collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case"; (5) "[t]he reliability of polygraph evidence has not been sufficiently established and its use at trial impinges upon the integrity of the judicial system." *Manual for Courts-Martial, United States, 1984*, App. 22 at A22-46 (1994 ed.); *see United States v. Helton*, 10 M.J. 820 n.10 (A.F.C.M.R. 1981) (concise description of the complex combination of theory, precise measurement techniques, and subjective interpretation required to support validity of polygraph).

*C. Presidential Authority to Promulgate Mil. R. Evid. 707(a)*

The Constitution vests in Congress the power to make rules "for the Government and Regulation of the land and naval forces." U.S. Const. art. I, § 8,



cl. 14. The Constitution also gives Congress the power to make all laws necessary to execute this power. U.S. Const. art. I, § 8, cl. 18. Congress executed this power by enacting the Uniform Code of Military Justice (UCMJ). In the UCMJ, Congress delegated to the President the authority to prescribe the modes of proof before trials by courts-martial, "in regulations, which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with [the UCMJ]." Article 36(a), UCMJ, 10 U.S.C. § 836(a) (1994). Article 36(a) is unquestionably a valid Congressional delegation. *See United States v. Smith*, 13 U.S.C.M.A. 105, 32 C.M.R. 105, 118-19 (1962); *accord United States v. Weiss*, 36 M.J. 224, 238 (C.M.A. 1992) (Crawford, J., concurring in the result), *aff'd*, —— U.S. ——, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994).

Pursuant to Article 36(a), UCMJ, the President promulgated Mil. R. Evid. 707, and the Manual for Courts-Martial in which it is found. *See* Exec. Order No. 12,767, 56 Fed. Reg. 30,284 (1991). Thus, the question we must resolve is rather narrow in scope. It is not whether polygraph examinations should be admissible in trials by courts-martial, but whether the President may constitutionally prohibit their admission.

"[O]ne of the first principles of constitutional adjudication [is the] basic presumption of the constitutional validity of a duly enacted state or federal law." *Lemon v. Kurtzman*, 411 U.S. 192, 208, 93 S. Ct. 1463, 36 L. Ed. 2d 151 (1973) (quoting *San Antonio School District v. Rodriguez*, 411 U.S. 1, 60,

93 S. Ct. 1278, 1311, 36 L. Ed. 16 (1973) (Stewart, J., concurring)). We must accord Mil. R. Evid. 707, and all other provisions of the Manual for Courts-Martial, the force of law, unless it conflicts with the UCMJ. *Noyd v. Bond*, 395 U.S. 683, 692, 89 S. Ct. 1876, 1882, 23 L. Ed. 2d 631 (1969); *Smith*, 32 C.M.R. at 119. Accordingly, we will not declare Mil. R. Evid. 707(a) unconstitutional in the absence of a clear showing that the President exceeded the discretionary powers conferred upon him by Article 36(a). *United States v. White*, 3 U.S.C.M.A. 666, 14 C.M.R. 84, 88 (1954).

*D. The Rights to Due Process and Compulsory Process*

Military members are afforded the protections by the United States Constitution, except for those which are expressly or by necessary implication inapplicable. *United States v. Stombaugh*, 40 M.J. 208, 211-12 (C.M.A. 1994). Both the right to due process under the Fifth Amendment and the right to compulsory process under the Sixth Amendment apply to service members at courts-martial. *Stombaugh*, 40 M.J. at 212; *United States v. Graf*, 35 M.J. 450, 454 (C.M.A. 1992), *cert. den.*, —— U.S. ——, 114 S. Ct. 917, 127 L. Ed. 206 (1994).

The Supreme Court has held that evidence is constitutionally required if it is relevant, material, and favorable to the defense. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982). The Court of Military Appeals has "unequivocally" adopted this holding for military cases. *United States v. Williams*, 37 M.J. 352, 361 (C.M.A. 1993) (citing *United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983)).



The Military Rules of Evidence have combined the common law concepts of relevance and materiality into one rule of relevancy. *See* S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual* 422 (3d ed. 1991).

> "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mil. R. Evid. 401. But, in analyzing relevance, we still must confront two questions: (1) Does the evidence have any tendency to make the existence of any fact more or less probable?; and (2) Is that fact of consequence to a determination of appellant's guilt?

What "favorable to the defense" means has been the subject of varying opinions; however, the Supreme Court specifically rejected the "conceivable benefit" test. "If we require only a showing that a witness could provide some 'conceivable benefit' to the defense, then 'the number of situations which will satisfy this test is limited only by the imaginations of judges or defense counsel.'" *Williams*, 37 M.J. at 361 (Gierke, J., concurring) (quoting *Valenzuela-Bernal*, 458 U.S. at 866-67, 102 S. Ct. at 3446). It appears the Supreme Court requires that the evidence be "vital to the defense" when "evaluated in the context of the entire record." *Valenzuela-Bernal*, 458 U.S. at 867-68, 102 S. Ct. 3446-47.

"Of course, the right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" *Rock v.*

*Arkansas*, 483 U.S. 44, 55, 107 S. Ct. 2704, 2711, 97 L. Ed. 2d 37 (1987) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 1046, 35 L. Ed. 2d 297 (1973)). Procedural and evidentiary rules to control the presentation of evidence which are "designed to assure both fairness and reliability in the ascertainment of guilt and innocence" are permissible. *Chambers*, 410 U.S. at 302, 93 S. Ct. at 1049; *see Washington v. Texas*, 388 U.S. 14, 23 n.21, 87 S. Ct. 1920, 1925 n.21, 18 L. Ed. 2d 1019 (1967). But, when the rule denies or significantly diminishes appellant's right to present evidence or to confront and cross-examine the witnesses against him, the competing interests must be closely examined. *Chambers*, 410 U.S. at 295, 93 S. Ct. at 1046 (citing *Berger v. California*, 393 U.S. 314, 315, 89 S. Ct. 540, 541, 21 L. Ed. 508 (1969)). As *Rock*, *Chambers*, and *Washington* are the most relevant Supreme Court cases to this inquiry, we will examine them in some detail.

*E. The Case Law*

Washington was convicted of murdering his former paramour's new boyfriend. Washington testified that a man named Fuller actually did the shooting and that he had tried to stop Fuller. Fuller, who had already been convicted of the murder, would have corroborated Washington's testimony, but his testimony was barred under Texas law. Two Texas statutes provided that persons charged or convicted as co-participants in the same crime could not testify for one another. The Supreme Court held that Washington was "denied his right to have compulsory process for obtaining witnesses in his favor because the State



arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Washington*, 388 U.S. at 23, 87 S. Ct. at 1925. The exclusion of this testimony was clearly arbitrary because it applied only to the defense, did not apply if the accomplice had been acquitted at his own trial, and "leaves [the accomplice] free to testify when he has a great incentive to perjury, and bars his testimony in situations where he has a lesser motive to lie." *Id.*

Chambers was convicted of murdering a policeman, Officer Liberty. McDonald, who was at the scene of the shooting, provided Chambers' attorneys with a signed, sworn confession to shooting the policeman with his own pistol which he subsequently discarded. McDonald also admitted to telling a friend that he had done the shooting. McDonald later repudiated his confession. At trial, a friend of McDonald testified that he saw McDonald shoot the victim. A cousin of the victim testified that right after the shooting he saw McDonald with a pistol in his hand. When the State chose not to call McDonald, Chambers did. McDonald admitted confession to the murder and his written confession was introduced. On cross-examination by the State, McDonald stated that he had recanted, he did not commit the murder, and he had only confessed because of promises that he would not go to jail and would share in a sizable tort recovery. The judge denied Chamber's motion to examine McDonald as an adverse witness because the State's "voucher" rule prevented a party from impeaching its own witness.

Chambers called three of McDonald's friends to testify. Hardin testified that on the night of the murder, McDonald admitted killing the victim. The judge sustained the State's objection that the testimony was hearsay and told the jury to disregard it because the State did not recognize declarations against penal interests as an exception to the hearsay rule. Turner testified, contrary to McDonald, that he was not with McDonald at the time of the shooting. The judge sustained the prosecution's hearsay objection to Turner's testimony that McDonald had admitted shooting the victim and had later asked Turner not to implicate him in the murder. Carter had been McDonald's friend for about 25 years. The day after the murder, McDonald told Carter he had killed Officer Liberty and disposed of the weapon. The judge refused to permit Carter to testify before the jury. Thus, as a result of the "party witness" or "voucher" rule and the State's hearsay rule, Chambers was "unable either to cross-examine McDonald or to present witnesses in his own behalf who would have discredited McDonald's repudiation and demonstrated his complicity." *Chambers*, 410 U.S. at 294, 93 S. Ct. at 1045. The Supreme Court held that Chambers was denied a fair trial in violation of the Due Process Clause of the Fourteenth Amendment because (1) the application of the "voucher" rule deprived him of the opportunity to contradict testimony that was clearly adverse, and (2) the trial judge erred by excluding reliable, corroborated, hearsay evidence critical to Chambers' defense. The Court made clear that such rules of evidence were not per se unconstitutional. They are unconstitutional only to the extent their application denies an accused a fair trial.



Rock shot her husband to death. When police arrived on the scene, Rock told them her husband had choked her and thrown her against the wall, she had picked up the pistol, appellant hit her again, and she shot him. Because she could not remember the exact details of the shooting, Rock's attorney suggested she submit to hypnosis in order to refresh her memory. During the two hypnosis sessions, Rock did not relate any new information; however, after the hypnosis, she remembered that her finger was not on the trigger, and the gun had discharged when her husband grabbed her arm during the scuffle. As a result, the pistol was examined by an expert who opined that the gun was defective and prone to fire when hit or dropped. The Arkansas rules of evidence barred all testimony that had been hypnotically refreshed. Upon motion by the prosecution, the judge limited Rock's testimony to the sketchy notes the hypnosis expert had made of her pre-hypnosis description of the shooting. The Supreme Court held that a per se rule which resulted in excluding the testimony of a hypnotically refreshed accused impermissibly infringed the right of an accused to testify on her own behalf. *Rock*, 483 U.S. at 62, 107 S. Ct. at 2714. The Court declined to express an opinion as to the constitutionality of a rule that would prohibit the hypnotically refreshed testimony of witnesses other than criminal defendants. *Rock*, 483 U.S. at 58 n.15, 107 S. Ct. at 2712 n.15.

In the early years of the UCMJ, the per se exclusion of polygraph evidence was established by case law. *See United States v. Massey*, 5 U.S.C.M.A. 514, 18 C.M.R. 138, 144 (1955); *United States v. Pryor*, 2 C.M.R. 365, 370-71 (A.B.R. 1951). No doubt based on this early case law, the President prohibited the

admission into evidence of conclusions based upon polygraph tests in the *Manual for Courts-Martial, United States, 1969 (Rev.)*, ¶ 142*e*. *See* Department of the Army Pamphlet 27-2, *Analysis of Contents, Manual for Courts-Martial, United States 1969, Revised Edition*, at 27-14 (1970). On 12 March 1980, the President substituted the Military Rules of Evidence for the evidentiary rules formerly contained in Chapter XXVII of the Manual for Courts-Martial. Exec. Order 12198, 45 Fed. Reg. 16,945 and 16,993 (1980). The new rules, based on the Federal Rules of Evidence, did not prohibit polygraph evidence and provided a new way of looking at expert evidence. *See United States v. Gipson*, 24 M.J. 246, 250-52 (C.M.A. 1987); *accord Daubert v. Merrell Dow Pharmaceuticals, Inc.*, —— U.S. ——, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Gone was the test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which required the proponent of scientific evidence to establish, as a foundation, that the evidence was of a type generally accepted in the scientific community. In its place, the President promulgated Mil. R. Evid. 401, 402, 403, and 702. *See United States v. Rodriguez*, 37 M.J. 448 (C.M.A. 1993); *Gipson*, 24 M.J. at 251. To be admissible, the scientific evidence must be relevant (Mil. R. Evid. 401 and 402); its probative value must not be "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" (Mil. R. Evid. 403); and must "assist the trier of fact to understand the evidence or to determine a fact in issue" (Mil. R. Evid. 702). Of course, in evaluating whether the evidence is probative and



helpful to the fact finder, the military judge should consider the degree of acceptance in the scientific community. *Gipson*, 24 M.J. at 252.

In *Gipson*, the Court of Military Appeals divided scientific evidence into three classes: (1) evidence for which "the principles underlying the expertise are so judicially recognized that it is unnecessary to reestablish those principles in each and every case, such as fingerprint, ballistics, or x-ray exidence; (2) evidence for which the principles can neither be accepted nor rejected out of hand; and (3) evidence based on practices and techniques that "have been so universally discredited that a trial judge may safely decline even to consider them, as a matter of law." *Gipson*, 24 M.J. at 249. The Court assigned the polygraph to the middle class and specified several reasons which precluded assigning it to the top class of scientific evidence: (1) criticism of the scientific principles on which the polygraph and the polygrapher's opinion is based; (2) the importance of the precision of the questions, the way the examiner intended them, and the examinee understood them; (3) the examinee's state of mind; and (4) other conditions such as whether the examinee was taking medications, illegal drugs, or attempting countermeasures to control the physical responses to be recorded by the polygraph. *Gipson*, 24 M.J. at 248-49; *see* 1 P. Giannelli & E. Imwinkelried, *Scientific Evidence*, § 8-3(A) (2d ed. 1993) (the authors' formulation of the issues: "the lack of empirical validation, the numerous uncontrollable factors involved in the examination, the subjective nature of the deception determination, and the absence of adequate standards for assessing the qualifications of examiners."); *Helton*.

Despite the Court's concern, it held that polygraph evidence was not per se inadmissible and an accused is entitled to attempt to lay foundational predicates for its admission. Of course, admissibility would depend on the competence of the examiner, the suitability of the examinee, the nature of the particular process employed, and other factors. *Gipson*, 24 M.J. at 252-53. By adopting Mil. R. Evid. 707, the President overruled *Gipson* as it applied to polygraph evidence.

The President promulgated Mil. R. Evid. 707 on June 27, 1991, to apply to all cases in which arraignment had been completed on or after 6 July 1991. Exec. Order 12,767, 56 Fed. Reg. 30,284 (1991). The Army Court of Military Review is the only appellate court to have directly addressed the constitutionality of this rule. *See United States v. Williams*, 39 M.J. 555 (A.C.M.R. 1994). In *Williams*, the accused admitted misappropriating three of eighteen unauthorized disbursements from the Chaplain's Fund and "passed" a polygraph exam which focused on other unauthorized disbursements. Williams claimed that the trial court's decision not to admit the polygraph evidence "impacted greatly" on his decision not to testify before findings. *But see Gipson*, 24 M.J. at 253 (Court of Appeals "would not condone [the admission of] such opinion testimony absent the examinee's consistent testimony"). Nevertheless, the Army Court examined the reasons the drafters gave for the rule. The Court found several of those reasons to be "in the nature of matters that are routinely resolved by trial judges under Mil. R. Evid. 403," and the final reason (concerns about reliability) to be "in its worst light, disingenuous, and at best incongruous



with the substantial investment the Department of Defense has made, and continues to make in polygraph examinations—not to mention the observation in *Gipson* that '[t]he greater weight of authority indicates that [the polygraph] can be a helpful scientific tool.'" *Williams*, 39 M.J. at 555 (quoting *Gipson*, 24 M.J. at 249). Based on its reading of *Washington*, *Chambers*, and *Rock*, the Court went on to hold, "under the facts presented," the appellant's

> Fifth Amendment right to a fair trial by court-martial, combined with his Sixth Amendment right to produce favorable witnesses on his behalf, affords him the opportunity to be heard of these foundational matters, and allows for the possibility of admitting polygraph evidence, notwithstanding the explicit prohibition of Mil. R. Evid. 707.

*Williams*, 39 M.J. at 555. Although the Army Court appears to have restricted its opinion to the facts of the case, we are unable to discern what circumstances would trigger a different result.

*F. Analysis*

We believe the case law suggests a framework for examining constitutional challenges to rules of evidence which prohibit an accused from presenting evidence:

> (1) The testimony must be relevant under Mil. R. Evid. 401 and 402 and vital to the defense when evaluated in the context of the entire record. If the evidence is either irrelevant or not vital to the defense, there is no constitutional right to present it.

(2) The rule of evidence may not *arbitrarily* limit the accused's ability to present reliable evidence.

(3) If the rule permits the admission of the evidence for some purpose, but not for others, it may not *arbitrarily* limit admission by the defense to a greater degree than by the prosecution.

(4) The rule of evidence must not *arbitrarily* infringe on the right of the accused to testify on his own behalf.

Applying these principles, we hold that the President's prohibition of the admission of polygraph evidence in Mil. R. Evid. 707(a) was a constitutionally permissible exercise of his Article 36(a), UCMJ, authority to prescribe modes of proof for trials by courts-martial.

(1) The Court of Military Appeals has held that polygraph evidence may be relevant to the credibility of a witness. We will assume appellant's credibility was relevant and vital to his defense. *See Rodriguez*, 37 M.J. at 452; *Gipson*. However, we do not believe presentation of polygraph evidence was vital to the court member's assessment of appellant's credibility.

(2) Mil. R. Evid. 707 does not arbitrarily limit the accused's ability to present reliable evidence.

(a) A rule is arbitrary if it is "determined by chance, whim, or impulse, and not by necessity, reason, or principle." *The American Heritage Dictionary of the English Language* 94 (3d ed. 1992). The President's decision to prohibit polygraph evidence is not based on whim or impulse, but rather on sound reasoning. The Court of Military Appeals noted still



valid concerns about the soundness of the underlying principles of the technique and the reliability of any particular polygraph evidence. *Gipson*, 24 M.J. at 248-49. That is why the Court assigned polygraph results to the middle class of scientific evidence. The President is rightly concerned that courts-martial could degenerate into a battle of polygraph examinations and experts that would impose a burden on the administration of military justice that would outweigh the probative value of the evidence. *See Helton*, 10 M.J. at 824 n.15 (citing *United States v. Urquidez*, 356 F. Supp. 1363 (C.D. Cal. 1973) (experience of District Judge in hearing 3 days of foundational evidence)).

(b) We are unwilling to follow the Army Court of Military Review's holding in *Williams*. The fact that military judges are often called upon to resolve issues similar to some of the concerns expressed by the drafters of Mil. R. Evid. 707, or that the Department of Defense uses the polygraph as an investigative tool, does not bar the President from determining that the probative value of polygraph evidence is substantially outweighed by other more compelling factors. The *Gipson* decision made sense in the absence of a rule prohibiting the admission of polygraph evidence. The Court of Military Appeals established the method for resolving the admission of all manner of scientific evidence, not just polygraph evidence—let the military judge hold an evidentiary hearing and render a decision. But, we believe the drafters' concerns for admitting evidence are significant enough for the President, exercising his Article 36(a), UCMJ, authority, to formulate a rule of evidence excluding it from courts-martial.

(c) "The first case to reject the admissibility of polygraph results was *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)." *Gipson*, 24 M.J. at 250. Over the years since *Frye*, the admissibility of polygraph evidence has been continually litigated in the federal courts, both on direct appeal and in *habeas corpus* actions. Nevertheless, we have been unable to locate any federal case, before or after the promulgation of the Federal Rules of Evidence, which suggests that the federal rule, or any similar state rule, unconstitutionally interferes with an accused's rights to due process or to present a defense.

(d) Furthermore, Mil. R. Evid. 707 applies a rule of evidence generally recognized by the federal courts. While not a part of the Federal Rules of Evidence, most of the federal circuit courts of appeal still hold that polygraph evidence cannot be introduced into evidence to establish the truth of statements made during the polygraph examination. *See United States v. Bounds*, 985 F.2d 188, 192 n.2 (5th Cir. 1993); *United States v. A & S Council Oil Co.*, 947 F.2d 1128 (4th Cir. 1991); *United States v. Lynn*, 856 F.2d 430 (1st Cir. 1988); *United States v. Bowen*, 857 F.2d 1337 (9th Cir. 1988); *United States v. Hall*, 805 F.2d 1410, 1416 (10th Cir. 1986); *United States v. Cardarella*, 570 F.2d 264 (8th Cir. 1978); *see also United States v. Rea*, 958 F.2d 1206, 1224 (2d Cir. 1992) (Court had "intimated in past" that results not admissible, so trial judge did not abuse his discretion in ruling that polygraph was not sufficiently reliable to warrant admission); *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989) (trial judge has discretion to admit polygraph evidence when both parties stipulate in advance as to circumstances of the test and the scope of admissibility and, subject to



three preliminary conditions, to impeach or corroborate the testimony of a witness at trial. The three conditions are: adequate notice to opposing party, opposing party given reasonable opportunity to have subject tested by own expert using substantially the same questions, and whether used to impeach or corroborate, admissibility is governed by the Federal Rules of Evidence, including Fed. R. Evid. 608. "Even where the above three conditions are met, admission of polygraph evidence for impeachment or corroboration purposes is left entirely to the discretion of the trial judge." 885 F.2d at 1536).

(e) While it might be arbitrary for the President to promulgate a rule which prohibits the admission of evidence which is assigned to the top scientific class, such as fingerprint evidence, we do not believe it is arbitrary to prohibit those techniques which fall into the middle or bottom classes, which by definition are less reliable. *See Gipson*, 24 M.J. at 249.

(3) The Mil. R. Evid. 707(a) prohibition on the admission of evidence is comprehensive and equally applicable to both the prosecution and the defense.

(4) Mil. R. Evid. 707(a) did not infringe on the right of the accused to testify on his own behalf.

We believe Mil. R. Evid. 707 is a permissible rule "designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers*, 410 U.S. at 302, 93 S. Ct. at 1049. We, therefore, reject the Army Court's reasoning in *Williams* and hold that Mil. R. Evid. 707 did not unconstitutionally infringe on appellant's rights to due process and to present a defense. Accordingly, the military judge did not err in preventing appellant from laying a foundation for the admission of polygraph evidence.

II. *County of Riverside v. McLaughlin* Credit

On 13 May 1992, near Centerville, Iowa, an Iowa State Police officer apprehended appellant for speeding and driving on a suspended license. Appellant told the officer he was on leave from March Air Force Base. The officer called the squadron and discovered that appellant was absent without leave. The squadron first sergeant asked the officer to detain appellant until military personnel could escort him back to the base. On 15 May, a military escort accompanied appellant back to March Air Force Base, where appellant's commander ordered him into pretrial confinement at 0030, 16 May. On 18 May, the commander completed a written memorandum, in accordance with R.C.M. 305(h)(2), concluding there was probable cause to believe appellant committed several named offenses under the UCMJ, and determining that continued pretrial confinement was necessary. On 20 May, the area defense counsel asked for a delay until 28 May in the pretrial confinement hearing to be conducted by a military magistrate. On 28 May, the military magistrate conducted the hearing and ordered appellant's confinement continued.

A person arrested without a warrant must "be given a prompt judicial determination of probable cause as a prerequisite to pretrial detention." *United States v. Rexroat*, 38 M.J. 292, 294 (C.M.A. 1993) (citing *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975)), *cert. denied*, —— U.S. ——, 114 S. Ct. 1296, 127 L. Ed. 2d 648 (1994). "[P]robable cause determinations made after 48 hours of arrest are presumptively untimely," and " 'the burden shifts to the government to demonstrate the existence



of a bona fide emergency or other extraordinary circumstance.' " *Rexroat*, 38 M.J. at 294 (quoting *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661, 1670, 114 L. Ed. 2d 49 (1991)). "If military exigencies prevent completion of probable-cause review within 48 hours, the fact of these exigencies may be used to rebut the presumption." *Rexroat*, 38 M.J. at 295-96. If the commander's probable cause determination, made under either R.C.M. 305(d) or (h), is made within 48 hours, and the commander is neutral and detached, then *Gerstein* and *McLaughlin* are satisfied. *Rexroat*, 38 M.J. at 298.

We first must decide when the *McLaughlin* 48 hours started to run—upon appellant's apprehension in Iowa or some later time. The Court of Military Appeals has ruled that the 48 hours starts at the time the commander actually orders the service member into pretrial confinement, not the time he was taken into custody. *Rexroat*, 38 M.J. at 295. When the accused's official custody is not at the direction of military authority and the military makes reasonably diligent efforts to secure physical custody over him and order him into pretrial confinement, we believe it does not make sense to start the clock until the commander actually orders him into pretrial confinement. Thus, we consider the 48-hour clock to have started at 0030, 16 May 1992. Even if the clock started when military authority requested appellant be detained in Iowa, we believe the military exigencies of getting him back to March Air Force Base overcame the *McLaughlin* presumption that the probable cause determination was untimely. *Rexroat*, 38 M.J. at 295-96.

Next, we must determine if appellant's commander was "neutral and detached," such that either his initial confinement order or decision to continue confinement satisfies *Gerstein* and *McLaughlin*. Although the commander later preferred charges against appellant, there is no evidence of record to suggest he was "directly or particularly involved in the command's law enforcement function." *United States v. McLeod*, 39 M.J. 278 (C.M.A. 1994) (quoting *United States v. Lynch*, 13 M.J. 394, 397 (C.M.A. 1982)); *see United States v. Lopez*, 35 M.J. 35, 41 (C.M.A. 1992). Therefore, we hold the commander was neutral and detached.

Finally, we must determine whether the commander had probable cause to place appellant into pretrial confinement. The prosecution did not present any evidence to show what information the commander had before him when he ordered appellant into pretrial confinement. Therefore, we are unable to conclude that, at the time he ordered appellant into pretrial confinement, the commander had probable cause to believe that appellant had committed an offense under the UCMJ, and that pretrial confinement was required by the circumstances. *See* R.C.M. 304(c); *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976). However, we find the commander's memorandum of his decision to retain appellant in confinement, dated 18 May, amply complies with *Gerstein* and R.C.M. 305(h)(2)(B). The prosecution failed to present evidence from which we could conclude that this memorandum, or the decision on which it was based, was accomplished within 48 hours (by 0030, 18 May). Although R.C.M. 305(k) does not specifically speak to the *McLaughlin* rule, we believe it is appropriate to apply its remedies



to *McLaughlin* violations. Therefore, we hold that appellant is entitled to 1 extra day of pretrial confinement credit against his sentence. Since appellant has already served his confinement, we order the credit be converted to 1 day of total forfeitures. *See* R.C.M. 305(k).

## III. Speedy Trial

Appellant insists that the military judge should have dismissed the charges against him with prejudice because the prosecution failed to bring him to trial within 90 days of the initiation of his pretrial confinement. Appellant's attack is broad in scope. He claims that neither the special court martial convening authority nor the Article 32 investigating officer were authorized to grant delays for speedy trial accounting: the special court-martial convening authority because the case was referred to a general court-martial; the investigating officer because no convening authority had authorized him to grant delays. Normally, we review the military judge's rulings on speedy trial for an abuse of discretion and reasonableness. *United States v. Longhofer*, 29 M.J. 22, 28 (C.M.A. 1989). Of course, we may find the facts ourselves, if we so desire. Article 66(c), UCMJ, 10 U.S.C. §866(c) (1994).

"The accused shall be brought to trial within 120 days after the earlier of (1) Preferral of charges; (2) The imposition of restraint under R.C.M. 304(a)(2)-(4); or, (3) Entry on active duty under R.C.M. 204." R.C.M. 707(a); *see United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993) (overruling *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R 166 (1971) and *United States v. Driver*, 23 U.S.C.M.A. 243, 49

C.M.R. 376 (1974) presumption of speedy trial violation when pretrial confinement exceeds 90 days). "All periods of time covered by stays issued by appellate courts and all other pretrial delays approved by a military judge or the convening authority shall be excluded when determining whether the period in subsection (a) of this rule has run." R.C.M. 707(c). Regardless of the 120-day rule, the prosecution must take immediate steps to bring a confined accused to trial. Article 10, UCMJ, 10 U.S.C. § 810 (1988); *Kossman*, 38 M.J. at 262 ("reasonable diligence" suggested as appropriate standard to evaluate Article 10 mandate).

Appellant was initially apprehended on 13 May 1992 by the Iowa police for violation of Iowa law. However, since the record is unclear as to whether appellant remained in custody in Iowa because of the civilian charges or to await escorts to return him to military control, we consider his pretrial confinement, for speedy trial purposes, to have begun on 13 May 1992. *See United States v. Keaton*, 18 U.S.C.M.A. 500, 40 C.M.R. 212 (1969) (date of confinement for speedy trial purposes is date incarcerated for military offense). Appellant was arraigned 154 days later—14 October 1992. At the defense request, the military judge granted a 34-day delay from 10 September to 14 October 1992. Thus, appellant was brought to trial on the 120th day under R.C.M. 707. We need not reach appellant's assertions that neither the special court-martial convening authority nor the investigating officer had the authority to grant delays in this case. We conclude the prosecution was timely under R.C.M. 707 and was pursued with reasonable diligence under Article 10, UCMJ.



## IV. CONCLUSION

The findings and sentence are correct in law and fact, and except for the *McLaughlin* credit for which appellant will be compensated 1 day of pay and allowances, no error prejudicial to the substantial rights of appellant occurred. Accordingly, the findings and sentence are

AFFIRMED.

Chief Judge DIXON, Senior Judges SNYDER, RAICHLE, and HEIMBURG, and Judges GAMBOA and BECKER concur.

Judge PEARSON, joined by Judge SCHREIER, (concurring in part and dissenting in part):

Speaking for the majority in *United States v. Gipson*, Judge Cox summarized his view on the reliability of polygraph evidence:

> In our assessment, the state of the polygraph technique is such that, depending on the competence of the examiner, the suitability of the examinee, the nature of the particular testing process employed, and such other factors as may arise, the results of a particular examination may be as good as or better than a good deal of expert and lay evidence that is routinely and uncritically received in criminal trials. Further, it is not clear that such evidence invariably will be so collateral, confusing, time-consuming, prejudicial, etc., as to require exclusion.

*Gipson*, 24 M.J. 246, 253 (1987).

If Judge Cox is right, and we think he is, this appellant was denied his constitutional right to lay

the foundation for relevant, material, and favorable exculpatory evidence vital for his defense. *See, eg., Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (accused's right to present evidence); *Gipson*, 24 M.J. at 254 app. (listing of articles and treatises on reliability of polygraphs); *McMorris v. Israel*, 643 F.2d 458, 461-462 (7th Cir. 1981) ("[W]e note that even the most ardent detractors from the validity of polygraph evidence concede a degree of reliability of 70% or higher for properly administered examinations."), *cert. denied*, 455 U.S. 967 (1982). *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, —— U.S. ——, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (standard for admitting expert testimony under Fed. R. Evid. 702); *United States v. Garcia*, 40 M.J. 533 (A.F.C.M.R. 1994) (standard for admitting expert testimony under Mil. R. Evid. 702); *United States v. Combs*, 35 M.J. 820 (A.F.C.M.R. 1992) (same), *aff'd*, 39 M.J. 288 (1994).

Litigated urinalysis cases often present the classic man versus machine contest. There are no eye witnesses to the urinalysis based drug charge, nor any witnesses who testify the accused was somehow impaired, nor any other coroborating evidence of drug use. Likewise, there is no evidence to show where or how the accused allegedly used the drug, or a precise time of use. Instead, machines—operated by humans—produce results—interpreted by humans— which the prosecution uses to procure a conviction. In this regard, the prosecutor calls an expert witness to explain that the machine results show the accused's urine specimen contained a metabolite of a chemical compound which is found in the drug charged. Consequently, the prosecution's case rests entirely on scientific evidence offered under Military Rule of Evidence 702.



Do urinalysis machines, or their operators, make "mistakes" which go undetected through normal quality control? We need only look at Pentium computer chips that can't divide, nuclear reactors that go haywire, and space shuttles that don't launch to answer that question.

So what if you are wrongfully accused of drug use based on an erroneous urinalysis result? You have no eyewitnesses to shake on cross-examination, or to help you. You have no alibi witnesses unless you are in direct observation of someone for 24 hours a day, 7 days a week, since it only takes a moment alone to snort cocaine or consume most other drugs. Because of the nebulous nature of the prosecution's evidence, you basically have only your word. But why should a judge or jury believe you, as opposed to the prosecution's "scientific" evidence, if you chose to testify? Credibility!

In a urinalysis case, the accused's credibility becomes the whole ball game if the accused denies use since urinalysis machines can't be cross-examined. If the court convicts, it chooses not to believe the accused, the only real witness to the offense. Thus, evidence reflecting favorably on the credibility of the accused's denial is relevant, material, and vital to the defense in a urinalysis case where the accused takes the stand, which brings us to polygraphs.

Polygraphs are also machines—operated by humans—which produce results—interpreted by humans. Polygraph evidence reflects on the credibility of an accused's denial of having used the drug charged.

*Gipson*, 24 M.J. at 253; *McMorris*, 643 F.2d at 461-2. Is it admissible on an accused's behalf—we think so in spite of the absolute prohibition in Military Rule of Evidence 707. *See United States v. Williams*, 39 M.J. 555 (A.C.M.R. 1994).

We agree the President may promulgate rules of evidence for trials by court-martial. However, the President may not promulgate a rule which infringes on an accused's constitutional right to present relevant, material, and favorable evidence. *See, e.g., Ellis v. Jacob*, 26 M.J. 90 (C.M.A. 1988) (striking down President's rule in R.C.M. 916(k)(2) precluding accused from presenting evidence of partial mental responsibility to negate state of mind element of an offense); *United States v. Hollimon*, 16 M.J. 164 (C.M.A. 1983) (recognizing constitutional limit on President's bar in Mil. R. Evid. 412(a) on admission of reputation or opinion evidence of nonconsensual sexual offense victim's past sexual behavior).

Consequently, we recognize a constitutional escape clause to Military Rule of Evidence 707, similar to that found expresly in Rule 412(b) which excludes evidence of a nonconsensual sexual offense victim's past sexual behavior Polygraph evidence is not admissible unless it is "constitutionally required to be admitted," that is, unless it is relevant, material, and favorable to the defense. *Cf. United States v. Williams*, 37 M.J. 352 (C.M.A. 1993) (constitutionally required evidence under Mil. R. Evid. 412). In this regard, military judges should "view liberally the question of whether the expert's testimony may assist the trier of fact." *Combs*, 35 M.J. at 826. And, "[i]f anything, in marginal cases, due process might make



the road a tad wider on the defense's side than on the Government's." *Gipson*, 24 M.J. at 252.

Here, the military judge did not afford appellant the opportunity to show his polygraph evidence met the constitutionally required criteria for admission. Consequently, we would return the record of trial to The Judge Advocate General for remand to the convening authority for a hearing on the admissibility of the proffered polygraph evidence in accordance with the procedures outlined in *United States v. Williams*, 39 M.J. at 559.

[AIR FORCE SEAL]

OFFICIAL

/s/ Alvin J. Stribling
ALVIN J. STRIBLING
Technical Sergeant, USAF
Chief Court Administrator

**APPENDIX C**

U.S. COURT OF APPEALS
FOR THE ARMED FORCES

---

No. 94-5006
CMR No. 9202646

UNITED STATES, APPELLANT

*v.*

JAMES L. WILLIAMS, Specialist U.S. Army,
APPELLEE

---

Argued March 30, 1995

---

OPINION OF THE COURT

COX, Judge:

1. The certified issue in this case asks whether Mil. R.Evid. 707, Manual for Courts-Martial, United States, 1984 (Change 5) (1991), which purports to bar receipt at courts-marial of polygraph evidence, violates the accused's constitutional rights.

2. Mil.R.Evid. 707 provides:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.
>
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.[1]



3. In the instant case the accused sought, unsuccessfully, to introduce evidence of an allegedly exculpable polygraph. In the circumstances of this case, we hold that the accused's rights were not violated and that the military judge did not err in excluding the evidence.

I

4. The accused was charged with forging checks between August 1991 and February 1992 (12 specifications), in violation of Article 123, Uniform Code of Military Justice, 10 USC § 923, and a single specification of stealing the cumulative value of the negotiated checks, $8,077.89—in violation of Article 121,

---

[1] The drafters of the rules cite a variety of "policy grounds" for excluding polygraph evidence, including, allegedly: the "danger that court members will be misled by polygraph evidence" and the "danger of confusion of the issues"; the "substantial waste of time when the collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case"; the "burden on the administration of justice that outweighs the probative value of the evidence"; and the assertion that "[t]he reliability of polygraph evidence has not been sufficiently established and its use at trial impinges on the integrity of the judicial system." Drafters' Analysis, Manual for Courts Martial, United States, 1984, at A22-46 (1994 ed.).

UCMJ, 10 USC § 921. He pleaded not guilty to all the forgery specifications. He also pleaded not guilty to the larceny specification, but, by exceptions and substitutions, he pleaded guilty to the lesser offense of wrongful appropriation, in the amount of $2,528.00.

5. Notwithstanding his pleas, however, a general court-martial composed of officer and enlisted members convicted the accused of all charges and specifications, as alleged. He was sentenced to a bad-conduct discharge, confinement for 3 years, total forfeitures, and reduction to E1. The convening authority approved the adjudged sentence.

6. The Court of Military Review[2], however, ordered the record of trial to be remanded for an additional hearing regarding admissibility of certain polygraph evidence. 39 MJ 555, 559 (1994). Thereupon, the Judge Advocate General of the Army certified the issue set out in ¶ 41 for this Court's review.

II

7. The Court of Military Review summarized the facts as follows:

> The [accused] was a Chaplains' Fund Clerk who, along with the Fund Manager, was in charge of collecting and disbursing funds for the chaplaincy within V Corps. During the period 18 August 1991—18 February 1992, a total of eighteen unauthorized disbursements were made from the fund account. The [accused] admitted to misappropriating three of these unauthorized disbursements in 1992, which he said that he

[2] See 41 MJ 213, 229 n.* (1994).



> intended to repay. He denied stealing the remainder.
>
> In July 1992, the [accused] consented to taking a Criminal Investigation Command (CID) administered polygraph test. The test centered on whether the [accused] stole from the chaplains' fund between August and November of 1991. In the polygraph examiner's opinion, there was no deception indicated when the [accused] responded "no" to questions pertaining to the tested issue. The charts created by the polygraph instrumentation were then sent to the CID's quality control center in Maryland, which opined that the test results were inconclusive.
>
> In August 1992, upon request by the [accused], he was retested by the same CID polygrapher. A more detailed pretest interview was conducted in order to focus the [accused] so that he would not be distracted, which could cause the test to be inconclusive. After this test, the examiner again opined that the [accused] was indicating no deception when he said that he did not steal money from the chaplains' fund between August and November 1991. Unlike the previous test, the examiner sent these polygraph charts to Heidelberg for review by his immediate supervisor, who was also an experienced CID polygrapher. The supervisor agreed with the findings and forwarded the charges to quality control of Maryland. This time, quality control opined that the test indicated no deception, and went on to say that the findings of the two examiners were "strong."

> The [accused] filed a motion at his court-martial to be allowed an opportunity to lay a foundation for the admission of the two exculpatory CID polygraph examinations. The military judge denied the motion, finding Mil.R.Evid. 707 to be a proper exercise of executive rule-making authority under Article 36, UCMJ, 10 USC § 836, and violative of neither the Fifth nor Sixth Amendments of the Constitution. This ruling "impacted greatly" on [accused's] decision not to testify.

39 MJ at 556-57.

III

8. The Government's evidence at trial consisted, in part, of the accused's sworn, written, signed pretrial statement. According to that statement, the interrogating agent asked, among other things:

> Did you, without proper authority, cash checks on the account of the Chaplains [sic] Fund, V Corps, with the intent of keeping the funds for yourself?

The accused responded: "Yes."

9. The accused also conceded therein that he fraudulently made and uttered three of the checks in issue, and he identified the uses to which he put the proceeds. The balance of the statement describes in some detail the mechanics of the accused's crimes and an acknowledgment that, on March 27, 1992, he deposited $900 into the Fund. The accused explained that he "sent for the money from a relative, to deposit the money into the Chaplains [sic] Fund account."[3] The statement contains no recitation suggesting that, at the time he uttered the checks, the accused only intended temporarily to deprive the rightful owner of the proceeds.



10. Additional prosecution evidence, in the form of numerous records and documents and the testimony of various investigative, banking, and Chaplains' Fund officials, showed in detail how the accused manipulated the established procedures to both perpetrate his thefts and to mask their discovery. Still further evidence documented the flowage of the proceeds of the forged checks into the accused's personal bank account.

11. The defense case consisted, in part, of the testimony of the accused's wife, wherein she attempted to explain several of the anomalous credits to their bank account. The balance of the defense case on the merits consisted of a series of character witnesses.[4] Notably, the accused did not testify on the merits.

---

[3] Presumably, the accused's argument that this deposit contradicted an intent permanently to deprive was undercut by evidence that he had previously been tipped off that his crimes had been detected. About a month before the accused's deposit, his supervisor "became suspect [sic] that there was some type of—something just wasn't right with the fund." The supervisor promptly notified higher authorities and, shortly thereafter, mentioned it to the accused.

[4] Ironically, some of these character witnesses may have proven counterproductive for the defense. The accused's company commander, for example, extolled the accused for his administrative and organizational abilities, his initiative, his being "computer literate," and his "unique ability to package things." According to the commander, "I give him a product to do, he just works magic." Considering the government evidence that the accused was able to perpetrate

IV

12. *United States v. Gipson*, 24 MJ 246 (CMA 1987), was a case in which we considered admissibility of polygraph evidence. Gipson proffered that he had secured, at his own expense, a polygraph examiner who had tested him and, as a result, was of the opinion that he was telling the truth when he denied committing various charged drug offenses. The prosecution countered that it, too, had a witness—a government polygrapher—who had tested Gipson and had reached the opposite conclusion. The military judge declined to permit either party to introduce polygraph evidence or even to attempt to lay a foundation for its admission. The judge concluded, inter alia, that such evidence had not met the requisite level of acceptance in the scientific community. 24 MJ at 247.

13. The issue squarely before us was whether the judge erred in applying the "general acceptance" test of *Frye* v. *United States*, 293 F. 1013 (D.C.Cir. 1923), or whether the relevance-helpfulness rules of Mil.R.Evid. 401-03 and 702 governed. As had several Federal Courts of Appeals before us (applying the corresponding Federal Rules of Evidence), we concluded that Frye was no longer the test to be applied to expert testimony. 24 MJ at 251. Passing no judgment on the ultimate admissibility of polygraph

---

his offenses and avoid detection as long as he did due to a series of missing computer backup disks, missing and falsified documents, computers that had been "tampered with," and a rash of mysterious viruses causing the office computers to crash, the evidence of the accused's extraordinary intelligence and skills may have merely complimented the Government's evidence.



evidence in general or on that polygraph evidence in particular, we concluded merely that the military judge applied the wrong test and that he erred in denying Gipson the opportunity to attempt to lay a foundation for admission of his polygraph evidence.

14. Later, in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the Supreme Court laid the Frye test to rest—in favor of the Rules of Evidence test—as the general test for receipt of expert testimony. *Id.* at 585, 113 S.Ct. at 2793. See also *United States* v. *Nimmer*, 43 MJ 252 (1995); *United States* v. *Youngberg*, 43 MJ 379 (1995).

15. However, the holdings of Gipson and Daubert do not, in this respect, govern the instant case. The Daubert opinion commenced with an analysis of Fed. R.Evid. 402, which provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

(Emphasis added.)

16. There being no other Federal Rule of Evidence which precluded the particular type of evidence (epidemiological) offered in Daubert (509 U.S. at 584, 113 S.Ct. at 2792), the opinion proceeded to an analysis of Fed.R.Evid. 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

> experience, training, or education, may testify thereto in the form of an opinion or otherwise.

For the Daubert Court, then, resolution turned on the questions of relevance and helpfulness, with the focus being on the means by which the trial judge was to determine these factors. 509 U.S. at 591-95, 113 S.Ct. at 2796-98.

17. The Gipson opinion was decided in a similar environment, as Mil.R.Evid. 707 was not yet in effect. Thus, we had to construe Mil.R.Evid. 402, which provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

(Emphasis added.) We also merely had to consider the general rules respecting relevance and helpfulness of expert testimony.

18. The advent of Mil.R.Evid. 707, however, changed things for the military. Now, rather than the Military Rules of Evidence providing a framework for analysis of relevance and helpfulness, 'these rules" expressly forbid receipt of the type of evidence here in issue. Thus Daubert and Gipson, being interpretations of very different rules, no longer control analysis of admissibility of polygraph evidence in courts-martial.

19. So also, the recent spate of Federal cases applying Daubert to polygraph evidence are not germane to our inquiry. See *United States* v. *Posado*,



57 F.3d 428, 429 (5th Cir.1995) ("the rationale underlying this circuit's per se rule against admitting polygraph evidence did not survive *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.* [*supra*]. Therefore, it will be necessary to reverse and remand to the district court for determination of the admissibility of the proffered evidence in light of the principles embodied in the Federal Rules of Evidence and the Supreme Court's decision in Daubert"); *United States* v. *Crumby*, 895 F.Supp. 1354 (D.Ariz. 1995) (improvements in accuracy of polygraph and Daubert permit defendant to introduce evidence that he passed polygraph to counter attacks on his credibility); but cf. *United States* v. *Lech*, 895 F.Supp. 582 (S.D.N.Y. 1995) (even assuming polygraph results are admissible under Fed.R.Evid. 702, questions calling for legal conclusions, but not underlying facts, would not assist factfinder).

V

20. Instead, the focus becomes whether, and under what circumstances, the per se prohibition of polygraph evidence in courts-martial might violate service-members' constitutional rights. The Supreme Court has, from time to time, encountered situations in which bars to receipt of evidence have been imposed upon the criminally accused. In *Washington* v. *Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), for example, Washington sought, unsuccessfully, to call a coparticipant, Fuller as a witness. Fuller allegedly would have testified that he, not Washington, was the triggerman in the murder. Texas statutes at the time of trial precluded coparticipants from testifying for one another, but not from testifying for the State. 388 U.S. at 16-17, 87 S.Ct. at 1921-22.

21. The Court concluded that Washington was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. 388 U.S. at 23, 87 S.Ct. at 1925.

22. In *Chambers* v. *Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), a State "party witness" or "voucher" rule prevented Chambers from examining, as an adverse witness, a person (McDonald) who had previously confessed to committing the crime of which Chambers stood accused. Because the State had declined to call McDonald, Chambers was forced to make him his own witness. While the State, on cross-examination, was permitted to elicit McDonald's recantation of the confession, Chambers was barred from cross-examining him as an adverse witness. In addition, State hearsay rules precluded Chambers from introducing the testimony of three other persons to whom McDonald had also allegedly confessed.

23. Regarding the "voucher" rule, the Court observed:

> The argument that McDonald's testimony was not "adverse" to, or "against," Chambers is not convincing. The State's proof at trial excluded the theory that more than one person participated in the shooting of Liberty [the deceased police officer]. To the extent that McDonald's sworn confession tended to incriminate him, it tended also to exculpate Chambers. And, in the



> circumstances of this case, McDonald's retraction inculpated Chambers to the same extent that it exculpated McDonald. It can hardly be disputed that McDonald's testimony was in fact seriously adverse to Chambers. The availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State. We reject the notion that a right of such substance in the criminal process may be governed by that technicality or by any narrow and unrealistic definition of the word "against." The "voucher" rule, as applied in this case, plainly interfered with Chambers' right to defend against the State's charges.

410 U.S. at 297-98, 93 S.Ct. at 1047 (footnote omitted).

24. Regarding the hearsay evidence, the State's declaration-against-interest exception to the rule against hearsay encompased declarations against pecuniary interest, but not declarations against penal interest. The Court noted that the statements in question 'were originally made . . . under circumstances that provided considerable assurance of their reliability." 410 U.S. at 300, 93 S.Ct. at 1048. In addition, "McDonald was present in the courtroom and was under oath. He could have been cross-examined by the State, and his demeanor and responses weighed by the jury." 410 U.S. at 301, 93 S.Ct. at 1049.

25. Concluding that Chambers' due process rights were violated, the Court commented:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense. In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurance of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

410 U.S. at 302, 93 S.Ct. at 1049 (citations omitted).

26. See also *Davis* v. *Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (State law barring receipt in evidence of juvenile records and probation status of key prosecution witness violated Davis' right of confrontation by depriving him of opportunity to show witness had motive falsely to implicate Davis); *Crane* v. *Kentucky*, 476 U.S. 683, 687, 106 S.Ct. 2142, 2145, 90 L.Ed.2d 636 (1986) (established State rule that trial court's determination regarding voluntariness of pretrial confessions is conclusive and may not be relitigated at trial denied petitioner opportunity



to attack accuracy of his purported confession and deprived him "of his fundamental constitutional right to a fair opportunity to present a defense"); *Rock* v. *Arkansas*, 483 U.S. 44, 58, 61-62, 107 S.Ct. 2704, 2712, 2714, 97 L.Ed.2d 37 (1987) (State's per se rule excluding all "hypnotically refreshed testimony" prevented Rock from showing that her memories might be reliable and potentially deprived her of the Fifth and Sixth Amendment right to be heard in her own defense).

VI

27. Thus, in the appropriate case, the question will be whether the proffered polygraph evidence is sufficiently reliable and necessary that its automatic exclusion violates the accused's constitutional trial rights. W conclude, however, that this is not such an appropriate case, for reasons we now address.

28. The issue of admissibility of the instant polygraph evidence was resolved at trial on the basis of proffers by the parties. The polygrapher did not testify, and no documentation of the test questions or results was presented. Nevertheless, both parties agreed that the critical "relevant" questions at the polygraph examination focused on whether the accused stole money from the chaplains' fund. The accused responded, "No," to such questions. Thus it was the accused's denial of criminality that the polygrapher was prepared to opine was true (i.e., that "no deception was indicated").[5]

---

[5] Of course a polygrapher's opinion cannot possibly gauge the objective truth of any statement. At best they can opine that the subject believed the statement to be true. Thus, just as multiple witnesses to an event may take away different memories and interpretations of the same physical mani-

29. Having failed to take the stand and submit himself to the crucible of cross-examination, the accused argues that he should have been permitted nevertheless to introduce this out-of-court assertion, bolstered as it was with the expert's opinion that it was truthful. Of course this statement was made expressly with a view toward trial, after the alleged commission of the offenses; and, in light of the polygraphic support, it was unabashedly offered to prove the truth of the matter asserted. In other words, the proffered evidence was not just hearsay, but super-enriched hearsay.[6]

30. Allowing a party, in effect, to testify by proxy —without at the same time affording the opposition an opportunity to cross-examine or the factfinder an opportunity to observe and make its own evaluation of the party's credibility—would amount to nullification of the adversary system and a throwback to a bygone and little-missed era. See 2 McCormick on Evidence §§ 244-46 at 90-99 (4th ed.1992). The constitutional rights of an the accused are designed to assure a fair trial, not to subvert the adversary process.

---

festation, in theory they could each pass a polygraph examination asserting their differing interpretations.

[6] The accused cannot capitalize on the vacuum arising from the fact that he obtained the unfavorable ruling in limine and then elected not to take the stand. In order to perfect his claim of right on appeal, it would have been necessary for him to testify or to establish some other valid evidentiary basis for admission of the hearsay evidence. *United States* v. *Gee*, 39 MJ 311 (CMA 1994); see *Luce* v. *United States*, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984). At trial, the accused offered no hearsay exception justifying receipt of the evidence.



31. That the expert's opinion cannot be separated from the underlying out-of-court declaration is self-evident, as the expert testimony clearly could not be offered simply to show that the accused made some truthful statement. Only when the opinion is connected with the underlying statement, explicitly or implicitly, can it have any arguable relevance to the case. We take it as obvious that when a party offers a polygrapher's opinion that a certain assertion did not indicate deception, the party is offering the evidence to prove that the assertion was true. A rose by any other name would smell as sweet.

32. The mere fact that the evidence was hearsay does not, alone, condemn it. However, unlike *Chambers*. v. *Mississippi*, *supra* (¶ 22) (involving the accused's fundamental right to confront an adverse witness), this evidence was not presumptively reliable or closely akin to a recognized hearsay exception. Indeed, none of the cases in which the Supreme Court found evidentiary prohibitions objectionable involved efforts by an the accused to circumvent the adversary process by "smuggling" in his assertions, in lieu of testifying.[7] Had the accused testified, he might at

---

[7] We recognize that, in some circumstances, it is possible under Fed.R.Evid. 703 and Mil.R.Evid. 703. Manual, supra, for a certain amount of hearsay evidence to be "smuggled" in as the basis for an expert's opinion. S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 739 (3d ed.1991); see S. Saltzburg, M. Martin & D. Capra, 2 Federal Rules of Evidence Manual 1134 (6th ed.1994). However, it is clear from the rule drafters' notes and the recorded decisions that such hearsay basis is permitted because it leads to some diagnosis or opinion other than that the hearsay itself was true. For example, a doctor might rely on a range of medical tests and reports, as well as statements

least have argued that the truthfulness of his out-of-court statement was not offered to prove the truth of the matter asserted, but, instead, for the inference that his consistent trial testimony was true.

33. In Gipson, we addressed a similar concern. As we stated then:

> Assuming a judge decides to admit the results of a given polygraph, how can they be used at trial? First and foremost, while polygraph evidence relates to the credibility of a certain statement, it does not relate to the declarant's character. At best, the expert can opine whether the examinee was being truthful or deceptive in making a particular assertion at the time of the polygraph exam. It is then for the factfinder to decide whether to draw an inference regarding the truthfulness of the examinee's trial testimony. Cf. *Commonwealth* v. *Vitello*, 376 Mass. 426, 381 N.E.2d 582, 597-98 (1978). Theoretically, it is conceivable that an expert's opinion about the truthfulness of a statement made during a polygraph exam could even support a direct inference as to guilt or innocence. However, we would not condone such opinion testimony absent the examinee's consistent testimony. If it were otherwise, the conclusions of the expert concerning the credibility of the declarant would be the only evidence presented to the factfinder. In this circumstance, we really would be concerned about usurpation of the factfinder's role.

---

of the victim or witnesses—not to show that the statements were true—but in order to reach a medical diagnosis. Rule 703 was never intended to become the electronic oath helpers' exception to the rule against hearsay. Cf. 2 McCormick on Evidence §§ 244-46 at 90-99 (4th ed.1992).



24 MJ at 252-53 (footnotes omitted).

34. In concluding that the accused had no right to introduce the polygraph evidence without taking the stand and testifying consistently, or without offering some other plausible evidentiary basis, we recognize that we resolve little of the underlying question of the constitutionality of Mil.R.Evid. 707. Indeed, we do not even resolve whether the per se exclusion of this genre of evidence can be sufficient to implicate a constitutional right of an accused. That is to say, is this collateral-type evidence (an out-of-court, post-offense assertion of innocence by an accused, offered by the accused) of the same constitutional magnitude as those types of evidence that the Supreme Court has ruled constitutionally required? There are simply so many variables in the circumstances of individual cases that we deem it fruitless at this point to speculate generally in the absence of specific facts.[8]

The decision of the United States Army Court of Military Review is set aside. The record of trial is returned to the Judge Advocate General of the Army

---

[8] Opinions from 41 MJ 213 to 43 MJ 389 have all included paragraph numbers as part of an experiment which the Court has been conducting to determine whether their use is feasible. We are now satisfied that putting paragraph numbers in our opinions presents no administrative burden. The Court was considering whether to require use in briefs of paragraph numbers instead of West internal page numbers for citation of quoted or referenced material found in an opinion. The citation would be to the first page of the opinion and paragraph number (42 MJ 340 ¶ 14), rather than to an internal page number (42 MJ 340, 343 or 42 MJ at 343). The Court has concluded that at this time it is not necessary to implement this change in the citation format. We would be interested in any comments on this proposal, including suggestions of alternative citation formats.

for remand to the Court of Criminal Appeals for further review.

Judge GIERKE concurs.

WISS, Judge (concurring with reservation):

35. I concur in the majority opinion except that, as to footnote 6, I expressly keep open for myself the question whether a non-testifying accused may preserve this issue for appellate review if he makes and loses a motion in limine to admit expert testimony concerning polygraphic evidence and then, through counsel—an officer of the court—forthrightly asserts that he would have testified had his motion been granted. See United States v. Sutton, 31 MJ 11 (CMA 1990).

CRAWFORD, Judge (concurring in part and in the result):

36. I agree with the majority's excellent discussion as to whether there is a constitutional right to introduce exculpatory polygraph evidence that would be paramount to any Military Rule of Evidence. However, since neither the Constitution nor the Uniform Code of Military Justice compels admission of exculpatory polygraph evidence, the majority could have stopped at that point. United States v. Rodriguez, 37 MJ 448, 453 (CMA 1993) (Crawford, J., concurring in the result).

37. In any event, since the accused did not take the witness stand, he did not preserve the certified issue for appeal. *United States* v. *Gee*, 39 MJ 311 (CMA 1994); see also *Luce* v. *United States*, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984).



38. However, I find curious that portion of the opinion that says "the proffered evidence was not just hearsay, but super-enriched hearsay." ¶ 29. The majority goes on to say, "[T]he expert's opinion cannot be separated from the underlying out-of-court declaration," ¶ 31, thus implying that there would be a hearsay objection to the expert's opinion. But as this Court stated in *United States* v. *Houser*, 36 MJ 392, 399, cert. denied, —— U.S. ——, 114 S.Ct. 182, 126 L.Ed.2d 141 (1993):

> Under Mil.R.Evid. 703, like Fed.R.Evid. 703, an expert's opinion may be based upon personal knowledge, assumed facts, documents supplied by other experts, or even listening to the testimony at trial.

39. Fed.R.Evid. 703 was enacted to allow the expert to rely upon hearsay evidence, that is, evidence that would be relied upon to form an opinion, such as statements from other doctors, x-rays, business reports, and so forth. S. Saltzburg & M. Martin, Federal Rules of Evidence Manual 73 (5th ed.1990); see also J. Kaplan, J. Waltz, & R. Park, Cases and Materials on Evidence 764, 806 (7th ed.1992).

40. Therefore, it would seem to me that the accused's statements to a polygrapher are a valid basis for an otherwise relevant opinion. See *Barefoot* v. *Estelle*, 463 U.S. 880, 896-903, 103 S.Ct. 3383, 3396-3400, 77 L.Ed.2d 1090 (1983); *United States* v. *Prevatte*, 40 MJ 396, 397 (CMA 1994); *United States* v. *Johnson*, 35 MJ 17 (CMA 1992); *State* v. *Daniels*, 337 N.C. 243, 446 S.E.2d 298 (1994). However, since I believe this case can be decided on other grounds, the question of whether the majority's view on hearsay is correct can wait for another day.

SULLIVAN, Chief Judge (concurring in the result):

41. I agree with much of the majority opinion but conclude it does not go far enough to directly answer the certified issue, which asks:

> WHETHER MILITARY RULE OF EVIDENCE 707 VIOLATES THE ACCUSED'S FIFTH AMENDMENT RIGHT TO A FAIR TRIAL OR HIS SIXTH AMENDMENT RIGHT TO PRODUCE FAVORABLE WITNESSES.

42. Initially, I would hold that the Fifth and Sixth Amendments of our Constitution do apply to the military. As the venerable Blackstone intimated long ago, I believe that a soldier who serves his country does not forgo his rights as a citizen. Blackstone, Commentaries on the Laws of England Bookfirst, Chapter 13 at 395 (1765). Furthermore, I would hold that due process and the right to a fair trial require admission of relevant and reliable evidence as long as it applies to the crime, the witnesses, and the legal defenses to the crime. The Constitution, however, does not require admission of machine-generated evidence that only shows whether the defendant believes that his claim of innocence is truthful. Modern courts have consistently prevented admission of evidence of truth-telling, and I would do so in this case.

43. The evidence sought to be introduced at this trial was the polygraph result of "no deception" when the accused was asked whether he "stole from the Chaplain's fund between August and November of 1991." See 39 MJ 555, 556 (ACMR 1994). In my view, the judge properly ruled this evidence inadmissible.



44. First, when evidence of polygraph tests results is offered at trial to support the credibility of an accused's pretrial statement denying an offense, its admission also raises serious questions under Mil.R. Evid. 608, Manual for Courts-Martial, United States, 1984. See generally *United States* v. *Azure*, 801 F.2d 336, 341 (8th Cir.1986). That Rule states:

> Rule 608. Evidence of character, conduct, and bias of witness
>
> (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Applying this rule, we have barred testimony from psychiatric and psychological experts that child-abuse victims are telling the truth in their pretrial complaints. *United States* v. *Marrie*, 43 MJ 35, 41 (1995); *United States* v. *Suarez*, 35 MJ 374, 376 (CMA 1992); *United States* v. *Arruza*, 26 MJ 234, 237 (CMA 1988), cert. denied, 489 U.S. 1011, 109 S.Ct. 1120, 103 L.Ed.2d 183 (1989). The same logic should be extended to a mechanical oath swearer or compurgator.

45. I would also note that admissibility of such evidence for this purpose infringes on the jury's role in determining credibility. See *United States* v. *Alexander*, 526 F.2d 161, 168-69 (8th Cir.1975). The

Ninth Circuit commented on this problem in *Brown* v. *Darcy*, 783 F.2d 1389, 1396-97 (1986), as follows:

> The introduction of polygraph evidence also infringes on the jury's role in determining credibility. Our adversary system is built on the premise that the jury reviews the testimony and determines which version of events it believes. Allowing a polygraph expert to analyze responses to a series of questions and then testify that one side is telling the truth interferes with this function. See *Alexander* 526 F.2d at 168; see also *Dowd*, 585 F.Supp. at 434. Polygraph evidence is different from other scientific evidence such as ballistics, fingerprints, or voice analysis, because it is an opinion regarding the ultimate issue before the jury, not just one issue in dispute. *Alexander*, 526 F.2d at 169. Providing the jury with an all or nothing evaluation of credibility and then telling the jury that this evaluation has an eighty percent to ninety percent chance of being accurate if the polygraph was properly administered interferes with, rather than enhances, the deliberative process.

These concerns are not addressed in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and Mil.R.Evid. 702. In my view, Mil.R.Evid. 707 addresses them and properly so.



## APPENDIX D

Military Rule of Evidence 707 provides:

> Rule 707. Polygraph Examinations
>
> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.
>
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.



**APPENDIX E**

## DRAFTERS' ANALYSIS OF THE MILITARY RULES OF EVIDENCE

The Military Rules of Evidence, promulgated in 1980 as Chapter XXVII of the Manual for Courts-Martial, United States, 1969 (Rev. ed.), were the product of a two year effort participated in by the General Counsel of the Department of Defense, the United States Court of Military Appeals, the Military Departments, and the Department of Transportation. The Rules were drafted by the Evidence Working Group of the Joint Service Committee on Military Justice, which consisted of Commander James Pinnell, JAGC, U.S. Navy, then Major John Bozeman, JAGC, U.S. Army (from April 1978 until July 1978), Major Fredric Lederer, JAGC, U.S. Army (from August 1978), Major James Potuk, U.S. Air Force, Lieutenant Commander Tom Snook, U.S. Coast Guard, and Mr. Robert Mueller and Ms. Carol Wild Scott of the United States Court of Military Appeals. Mr. Andrew Effron represented the Office of the General Counsel of the Department of Defense on the Committee. The draft rules were reviewed and, as modified, approved by the Joint Service Committee on Military Justice. Aspects of the Rules were reviewed by the Code Committee as well. *See* Article 67(g). The Rules were approved by the General Counsel of the Department of Defense and forwarded to the White House via the Office of Management and Budget which circulated the Rules to the Departments of Justice and Transportation.

The original Analysis was prepared primarily by Major Fredric Lederer, U.S. Army, of the Evidence

Working Group of the Joint Service Committee on Military Justice and was approved by the Joint Service Committee on Military Justice and reviewed in the Office of the General Counsel of the Department of Defense. The Analysis presents the intent of the drafting committee; seeks to indicate the source of the various changes to the Manual, and generally notes when substantial changes to military law result from the amendments. This Analysis is not, however, part of the Executive Order modifying the present Manual nor does it constitute the official views of the Department of Defense, the Department of Transportation, the Military Departments, or of the United States Court of Military Appeals.

The Analysis does not identify technical changes made to adapt the Federal Rules of Evidence to military use. Accordingly, the Analysis does not identify changes made to make the Rules gender neutral or to adapt the Federal Rules to military terminology by substituting, for example, "court members" for "jury" and "military judge" for "court". References within the Analysis to "the 1969 Manual" and "MCM, 1969 (Rev.)" refer to the Manual for Courts-Martial, 1969 (Rev. ed.) (Executive Order 11,476, as amended by Executive Order 11,835 and Executive Order 12,018) as it existed prior to the effective date of the 1980 amendments. References to "the prior law" and "the prior rule" refer to the state of the law as it existed prior to the effective date of the 1980 amendments. References to the "Federal Rules of Evidence Advisory Committee" refer to the Advisory Committee on the Rules of Evidence appointed by the Supreme Court, which prepared the original draft of the Federal Rules of Evidence.



During the Manual revision project that culminated in promulgation of the Manual for Courts-Martial, 1984 (Executive Order 12473), several changes were made in the Military Rules of Evidence, and the analysis of those changes was placed in Appendix 21. Thus, it was intended that this Appendix would remain static. In 1985, however, it was decided that changes in the analysis of the Military Rule of Evidence would be incorporated into this Appendix as those changes are made so that the reader need consult only one document to determine the drafters' intent regarding the current rules. Changes are made to the Analysis only when a rule is amended. Changes to the Analysis are clearly marked, but the original Analysis is not changed. Consequently, the Analysis of some rules contains analysis of language subsequently deleted or amended.

In addition, because this Analysis expresses the intent of the drafters, certain legal doctrines stated in this Analysis may have been overturned by subsequent case law. This Analysis does not substitute for research about current legal rules.

Several changes were made for uniformity of style with the remainder of the Manual. Only the first word in the title of a rule is capitalized. The word "rule" when used in text to refer to another rule, was changed to "Mil.R.Evid." to avoid confusion with the Rules for Courts-Martial. "Code" is used in place of Uniform Code of Military Justice. "Commander" is substituted for "commanding officer" and "officer in charge." *See* R.C.M. 103(b). Citations to the United States Code were changed to conform to the style used elsewhere. "Government" is capitalized when used as a noun to refer to the United States

Government. In addition, several cross-references to paragraphs in MCM, 1969 (Rev.) were changed to indicate appropriate provisions in this Manual.

With these exceptions, however, the Military Rules of Evidence were not redrafted. Consequently, there are minor variations in style or terminology between the Military Rules of Evidence and other parts of the Manual. Where the same subject is treated in similar but not identical terms in the Military Rules of Evidence and elsewhere, a different meaning or purpose should not be inferred in the absence of a clear indication in the text or the analysis that this was intended.

* * * *

Rule 707. Polygraph Examinations.

Rule 707 is new and is similar to Cal. Evid. Code 351.1 (West 1988 Supp.). The Rule prohibits the use of polygraph evidence in courts-martial and is based on several policy grounds. There is a real danger that court members will be misled by polygraph evidence that "is likely to be shrouded with an aura of near infallibility." *United States v. Alexander*, 526 F.2d 161, 168-169 (8th Cir. 1975). To the extent that the members accept polygraph evidence as unimpeachable or conclusive, despite cautionary instructions from the military judge, the members' "traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted". *Id.* There is also a danger of confusion of the issues, especially when conflicting polygraph evidence diverts the members' attention from a determination of guilt or innocence to a judgment of the validity and limitations of polygraphs. This could result in the court-martial degenerating into a trial of



the polygraph machine. *State v. Grier*, 300 S.E.2d 351 (N.C. 1983). Polygraph evidence also can result in a substantial waste of time when the collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case. Polygraph evidence places a burden on the administration of justice that outweighs the probative value of the evidence. The reliability of polygraph evidence has not been sufficiently established and its use at trial impinges upon the integrity of the judicial system. *See People v. Kegler*, 242 Cal. Rptr. 897 (Cal. Ct. App. 1987). Thus, this amendment adopts a bright-line rule that polygraph evidence is not admissible by any party to a court-martial even if stipulated to by the parties. This amendment is not intended to accept or reject *United States v. Gipson*, 24 M.J. 343 (C.M.A. 1987), concerning the standard for admissibility of other scientific evidence under Mil. R. Evid. 702 or the continued vitality of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Finally, subsection (b) of the rule ensures that any statements which are otherwise admissible are not rendered inadmissible solely because the statements were made during a polygraph examination.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1997 417722 40235